

No. 14523

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United States  
Court of Appeals  
for the Ninth Circuit

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TRANS WORLD AIRLINES, INC., a corporation,  
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, PHILLIP S. LANDIS, SAM McKEE, VICTOR S. SWANSON, EDWARD B. BARON and DONALD A. CAMERON, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. DIXON, as Manager and Chief Engineer of the San Francisco Airport, and J. M. TURNER, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco,  
Appellees.

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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 359 to 724, inclusive)

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Appeal from the United States District Court for the Northern  
District of California, Southern Division

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PAUL P. O'BRIEN,

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(Testimony of Harold Stanley Messersmith.)

Q. Are airlines in competition with TWA paying on the basis of regular rates and charges according to the schedule now in effect?

Mr. Dyer: I will object to that upon the ground that it is incompetent, irrelevant and immaterial; what some other user of the Airport pays can have no bearing on the liability of TWA to the City and County.

The Court: Objection overruled. Proceed.

A. Yes, other scheduled airlines are paying the prevailing and established schedule of rates and charges.

The Court: What are the prevailing rates and charges?

The Witness: For that particular type of aircraft?

The Court: Yes.

The Witness: On the take-off basis it would amount to approximately fifteen to sixteen dollars per take-off, which as I said before, would entitle them to a landing also. I might add that that includes not only the use of the runways, but all of the common use facilities and the public address [137] announcement concerning the arrivals and departures of aircraft as well.

Mr. Thomson: Q. Will you describe in a little further detail what those common use facilities mean?

A. The common use facilities I have reference to include various lights, which include the center lane approach lighting system; the use of the run-

(Testimony of Harold Stanley Messersmith.)

ways; the use of the taxiways; the loading aprons and the course fingers and the public address system.

Q. By common use facilities, as that phrase designates, is meant the common facilities that are available to all airlines?

A. Yes, that is true; they are available to all airlines and to others.

Q. That leads me into a subject concerning aircraft other than those planes which run on scheduled operations. Do you have other types of aircraft coming in and out of the Airport?

A. Yes; we have corporation-owned aircraft, privately-owned aircraft, non-scheduled or irregular air carrier aircraft, and military.

Q. Will you define what you mean by that word "corporation aircraft"?

A. Well, the corporation-owned aircraft is an aircraft that is normally owned by a corporation and operated by them for the various officials of the company in carrying out their business. [138]

Q. Do you find that practice of corporation aircraft operating increasing or decreasing?

A. There has been a considerable increase since World War II in the use of corporation type aircraft.

Q. Are there aircraft other than those you have described? I take it I may be permitted to lead the witness a moment. Are there private flyers coming in and out of the Airport?

A. Yes, there are privately-owned aircraft that

(Testimony of Harold Stanley Messersmith.)

use the Airport and some of their airplanes run into sizes as large as the smaller aircraft operated by the air carriers.

Q. All of these different types of aircraft, including the corporation-owned aircraft and so forth, and the private flyers, amount to what percentage of the activity at the Airport?

Mr. Dyer: Just a moment; I wonder if we could have a foundation laid as to whether you mean volume or frequency of use?

Mr. Thomson: I am going to ask the witness to put it in percentage of movement.

A. In percentage of movement, the private aircraft, corporation and military movements amount to approximately 20 per cent of the total traffic at the San Francisco Airport.

The Court: How much?

The Witness: Twenty per cent.

Mr. Thomson: Q. How are these aircraft that you have just described handled upon the basis of charges? [139]

A. They are required and do pay the same schedule of charges as is applicable to scheduled air carriers in our 1950 schedule of rates and charges. There is no differential between a corporation-type aircraft landing there and a scheduled air carrier; they are on an even basis.

Q. Well, that is likewise true, is it not, of privately-owned aircraft that might be owned by some flying enthusiast rather than a corporation?

(Testimony of Harold Stanley Messersmith.)

A. That is correct; it applies to private aircraft owners and irregular air carriers as well.

Q. Now getting to the subject of the use by the Army during the period of World War II, what did those uses mainly consist of?

A. During the early stages of the war the Army principally had at the San Francisco Airport P-39 aircraft. That is an airplane that I would estimate weighs in the vicinity of twenty to twenty-five thousand pounds. It is a pursuit type of aircraft. In 1943 they introduced a number of P-38 aircraft that were operated at the Airport. They weighed approximately thirty to thirty-two thousand pounds.

Q. Did transport planes come into the Airport with any regularity?

A. Yes, in 1944 or thereabouts United Air Lines and Pan American operated aircraft for the United States Army and the Navy from the San Francisco Airport. Those aircraft were of [140] the DC-4 type and weighed approximately 54,000 pounds.

Q. Did bombers come into the Airport during that period of time, of the United States?

A. There were relatively few bombers operated in and out of the San Francisco Airport during the war.

Q. And how much did those bombers weigh?

A. A few of them may have weighed as high as 65,000 pounds.

Q. A few of them may have weighed as high as 65,000 pounds. Was there any regular scheduling of transport planes or bombers?



(Testimony of Harold Stanley Messersmith.)

A. Both United Air Lines and Pan American operated a limited number of trans-Pacific flights from the San Francisco Airport during the war.

Q. How many on an average per day, bombers or transports, would come into the Airport?

A. Of the heavy type of aircraft, perhaps two or three.

Q. Per day? A. Yes.

Q. Is there any distinction in your mind, Mr. Messersmith, about strain upon airport facilities from intermittent operation or on regular operation or schedules?

A. Yes, there is. Given time, the difference—During war conditions you would anticipate that your airport would be put to maximum utilization, and we actually encouraged the use of the field by the Military then. We made them available to them without charge. However, they did agree to take care [141] of the damage that was sustained because of the use of heavy aircraft that would exceed the capacity of our facilities.

Now, you asked me whether the intermittent or minor use of the field as compared with continuous use would have a different effect. Yes, a repetition of a strain or load or excess loads on a runway or taxi-way would accelerate the deterioration. You may be able to accommodate a few movements in excess of the loading capacity on a given facility, but if you have a repetition of those movements you are going to accelerate the deterioration.

Q. Now, did you observe upon the surface at

(Testimony of Harold Stanley Messersmith.)

the Airport any deterioration that was visible to the eye?

Mr. Dyer: I will object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: If he knows, he may answer. Objection will be overruled.

A. Yes, I definitely did. As a matter of fact——

Mr. Thomson: Q. Before you go further, let me ask you about what date that was when you first observed that condition?

A. 1946 and 1947, about that time.

Q. And what did you see?

A. The loading apron in front of the terminal building, which had been constructed to accommodate aircrafts weighing up to 28,000 pounds, deteriorated and broke up. The pavement became disintegrated to such an extent that we had to purchase [142] on an emergency basis what is called heavy bomber landing mats and cover the entire area so that TWA and other scheduled air carriers, heavy aircraft, could continue to utilize this facility.

Later, extensive reconstruction of the area, or complete reconstruction of the area was necessary in order to have a safe operation in front of the Domestic Terminal Building.

Q. Bearing in mind the—Oh, pardon me, I withdraw that.

In October 1942, what were the lengths of the runways at the Airport?

A. In October 1942 the prevailing wind or prin-

(Testimony of Harold Stanley Messersmith.)

incipal runway at the Airport, which is designated as 10-28, was 6,000 feet in length and was 150 feet wide. The other runway available at the time was the north-south runway, designated as 18-36, was 4,500 feet in length and 150 feet wide.

A third runway that was soon to become deactivated was 5,500 feet in length and 150 feet wide.

The Court: What is the situation at the present time in relation to the runways?

The Witness: At the present time we have four runways. The instrument-landing or prevailing wind runway is 8,870 feet in length, 200 feet in width. The parallel runway to that is 6,500 feet in length, 200 feet wide.

The north-south runways are now designated as 1-19, and they are 7,750 feet in length and 7,000 feet in length, [143] respectively. There are two of them and they are parallel runways.

Mr. Thomson: Q. In addition to the enlargement on the length and width dimensions of the runways, was there anything else done to them since 1940?

A. Well, in addition to lengthening them, the elevation of the entire Airport had to be increased in order to gain sufficient compaction to be able to stand the heavy loads of aircrafts that were introduced into service. That meant that the runways had to be not only lengthened, but strengthened considerably and in accordance with CAA requirements, had to be widened from 150 feet to 200 feet.

That necessitated a complete change in the light-

(Testimony of Harold Stanley Messersmith.)

ing system throughout the Airport in addition to the rest. It entailed a complete construction of a new drainage system to take care of the run-off of water, that is, what rain water that may fall on the runways. It was a very comprehensive business and run into approximately \$18,000,000.

Q. In your opinion, what necessitated these alterations and improvements that you have described?

Mr. Dyer: Just a moment. I object to that upon the ground that it is obviously calling for an opinion and conclusion of the witness.

Mr. Thomson: I think it is a question on which the witness can give his opinion and conclusion. He has been [144] at the Airport for years.

Mr. Dyer: I think that calls for the opinion of an expert engineer, if Your Honor please, one who is professionally qualified.

The Court: Does that not go to the weight of the testimony, if there is any question about it?

Mr. Dyer: I think it not only goes to the weight, Your Honor, but in accordance with our previous objection, it is also not pertinent to the issues here.

In addition, it would seem to me this testimony must necessarily be irrelevant.

The Court: Well, I want to say to you that you would be amazed how little I know about this Airport down here, and I wish to be informed, and on every detail of it, without doing violence to your legal objections. I will allow the testimony. The objection will be overruled.



(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: Q. Have you the question in mind, Mr. Messersmith?

A. No, I would appreciate having the question repeated.

The Court: Pardon me, didn't you say you were 17 years down there?

The Witness: I have been with the Airport since 1927.

The Court: That is how many years?

The Witness: 26. A little in excess of 26 years.

The Court: All right, proceed. [145]

(Thereupon the Reporter read: "Question: In your opinion what necessitated these alterations and improvements that you have described?")

A. Well, in order for the scheduled air carriers who were operating from the airport and who had planned to operate larger aircraft, it was necessary that these—it was necessary to accomplish these improvements if they were to continue their operations at the San Francisco Airport in safety.

Mr. Thomson: Q. Mr. Messersmith, holding in mind the facilities with which you are familiar that were at the Airport in October of 1942, would it in your opinion have been possible for TWA to operate the planes now being operated by them with safety at the present day? A. No.

Mr. Dyer: Your Honor, may it be deemed that I am objecting to all these questions?

The Court: The record so shows. Objection overruled.

A. No, it would not be.

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: Q. Do you know a gentleman by the name of Mr. Jens?

A. No, I do not personally know Mr. Jens, but I have received various correspondence—or I should say the manager of the Airport department has received various correspondence from Mr. Jens.

I understand he is the secretary for Trans World Airlines, [146] and he has executed some of the agreements, or at least signed some of the agreements between TWA and the City.

Q. When those communications directed to the manager of the Airport came in, would they come to your attention? A. Yes, they did.

Mr. Thomson: I think, gentlemen, you will stipulate that Mr. Jens is what he assumes to be, a secretary of Trans World?

Mr. Thompson: He was. He is not now.

Mr. Thomson: He was in May—May 17th, 1946, secretary?

Mr. Dyer: We will not stipulate he wrote that letter in his capacity as an employee of TWA. To our knowledge he wrote that letter in his capacity as a member of a committee that was formed at the request of the Airport people.

The Court: The letter will have to speak for itself if there is any question about it.

Mr. Thomson: Q. I will show you this letter under date of May 17, 1946, signed by A. N. Jens, Jr., who signed as secretary, and these gentlemen have been good enough to stipulate he was secre-

(Testimony of Harold Stanley Messersmith.)  
tary of Trans Continental and Western Air at that time. Do you recall receiving that letter?

A. Yes, I do.

Q. May I have it back, Mr. Messersmith?

A. Surely.

Mr. Thomson: I will offer this letter as our next exhibit [147] in order.

Mr. Dyer: We object to it on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection will be overruled.

Mr. Dyer: No foundation has been laid.

The Court: It may be admitted and marked.

The Clerk: Defendants' Exhibit E admitted and filed in evidence.

(Thereupon letter identified above was received into evidence and marked Defendants' Exhibit E.)

Mr. Thomson: Q. That letter, in substance, Mr. Messersmith, makes a recommendation—may I see that, Mr. Clerk, and I will give it right back to you?—That letter, Mr. Messersmith, in substance requests that a certain——

The Court: (interposing) It is dated when?

Mr. Thomson: May 17, 1946, Your Honor. Slightly less than four years after the execution of the lease.

Mr. Thomson: Q. This letter in substance makes recommendation of a certain space between runways of 1500 feet from center line to center line. What was done, if anything, with respect to the request contained in this letter?

(Testimony of Harold Stanley Messersmith.)

A. A conference——

Mr. Dyer: Just a moment. Mr. Thomson, I wonder if we could go into that a moment? I don't recall at this point whether any request was made in the letter. [148]

Mr. Thomson: You will find it there in so many words, Mr. Dyer.

Mr. Dyer: Perhaps I will. I would like to see it.

Mr. Thomson: It is about the middle of the letter.

The Court: We will take a recess and you will have an opportunity to examine it if you wish.

(Short recess.)

Mr. Thomson: Is there a pending question, Mr. Reporter? I rather think there is.

The Reporter: The document was offered in evidence.

Mr. Thomson: Was that received in evidence? Yes, thank you.

Mr. Thomson: Q. What was done, if anything, in response to the request contained in this letter about the distance between those runways?

A. A conference was held between TWA representatives and representatives of the Airport in the manager's office so that the recommendations of TWA could be fully discussed and a decision reached. The manager of the Airport Department, Mr. Doolin, advised TWA that we could not afford to build runways with a 1500-foot separation between the center line, that the cost would be pro-

(Testimony of Harold Stanley Messersmith.)

hibitive. That was the general outcome of the conference.

Mr. Thomson: You may take the witness. Oh, pardon me, there is one thing more I overlooked.

Mr. Thomson: Q. In testifying as to the imposition of costs and charges pursuant to the schedule to make it safe for this type of aircraft, were there any types of aircraft that were exempt from payment of the rates and charges?

A. Yes, military aircraft.

Q. You made no charge for military aircraft?

A. That is correct. There was no charge for military aircraft.

The Court: Is that true now?

The Witness: Yes, that is correct, at the present time.

Mr. Thomson: Q. With the exception of military aircraft, I understand you too have testified that all the other types of aircraft which you have mentioned, the private flyers, the corporation type of plane, and those others you have mentioned, they are all charged at the regular rates?

A. They are all paying the same rate for the same weight of aircraft.

Mr. Thomson: You may take the witness.

Mr. Dyer: Is Your Honor disposed to hear motions to strike in reference to the testimony of this witness at this time or at the conclusion of the case?

The Court: At the conclusion of the case.

Mr. Dyer: Thank you, sir. And I take it we are



(Testimony of Harold Stanley Messersmith.)

cross examining Mr. Messersmith, of course, without prejudice to any subsequent motion to strike?

The Court: That is right. [150]

### Cross Examination

Mr. Dyer: Q. Mr. Messersmith, as I listened to your recitation of your duties at the Airport I understood that you are the business administrator of the Airport, is that correct?

A. I act as principal assistant to the manager of the Airport Department in the business administration of the Airport.

Q. And you have to do with the collection of funds from various businesses at the Airport, do you not?

A. Yes, that is one of my functions.

Q. And that includes collection of funds not only from airlines but other businesses that utilize space and facilities at the Airport, is that not so?

A. Yes, that activity is under my jurisdiction, if I do not perform it personally.

Q. During the course of the improvement at the airport, from time to time have you planned the development of the Airport?

A. I have collaborated with Mr. Turner, the Manager of Utilities, and the Manager of the Airport and others in the Utilities Engineering Bureau in preparation of preliminary plans for the development of the Airport.

Q. You have been cognizant of the plans made and have taken some part therein, is that so, sir?

(Testimony of Harold Stanley Messersmith.)

A. Yes.

Q. During the course of your tenure at the San Francisco [151] Airport have you had an opportunity to receive any professional training in cost engineering?

A. No, I have no professional training in cost engineering. That training that I have is based on practical experience.

Q. You are not a registered, professional engineer, is that so, sir? A. I am not.

Q. And you are not a certified public accountant? A. I am not.

Q. The Airport, of course, is operated by the Public Utilities Commission, is it not?

A. Yes, it is.

Q. And the Airport is a rather large business, isn't that so, sir?

A. The Airport is a large business.

Q. In addition to those airlines, the airline business that is conducted there, there are many other businesses, is that not so, sir?

A. Yes, there are many other businesses.

Q. How many airlines are presently operating at the Airport? We received information from various other witnesses that you are at the spot, Mr. Messersmith, at the Airport at the present time, and I would like to have that information.

A. There are 12 scheduled air carriers regularly operating from the San Francisco Airport at the present time. [152]

Q. Would you be good enough to give us your

(Testimony of Harold Stanley Messersmith.)  
information concerning the number of passengers that utilized the Airport last year, passed through—approximately?

A. Approximately two million five hundred thousand.

Q. And is it a fact that about every passenger that comes to the Airport brings with him about one or more other persons?

A. That figure you just quoted is the national standard. However, when we submitted data to the CAA on that—that is where you acquired your figure, I believe—we found the number of visitors at our Airport were far lower than that number.

Q. Well, what were the total number of people, according to your knowledge, that used the Airport last year—passengers and non-passengers?

A. Are you asking me to guess a number?

Q. I want your best knowledge. I don't want an exact figure. I want an approximate figure.

A. Well, excluding the employees that come to the Airport, which consists of between eight and nine thousand people, there were probably close to three and one-quarter million people visited the Airport, including passengers coming in and out of the Airport and sightseers.

Q. And they were all members of the public that patronized the various businesses there, were they not?

A. Yes, they were members of the public that patronized businesses there, but they didn't neces-



(Testimony of Harold Stanley Messersmith.)

sarily all use the [153] common use facilities of the Airport for which we effect charges.

Q. But they were all members of the public that used the roads in front of the air terminal and space available to the general public, is that not so?

A. Yes, on the same basis of charges that apply to the airline patrons. That is, if they used the parking lot they paid the same fee for parking privileges as an airline customer. Yes, that is correct.

Q. Now, does the airline have any definite service area subject to the Public Utilities—I beg your pardon.

Does the Airport have any definite service area subject to the Public Utilities? Do you understand what I mean by that, sir?

A. I would prefer that you elaborate on it.

Q. You understand that recognized utilities, old line utilities such as the telephone company and gas company, have a certain area in which they alone have the exclusive right to serve? You understand that, do you not, sir?

A. Do you mean within the property that they own? You referred to the telephone company. You mean they have exclusive rights within that building?

Q. They have exclusive rights within the general area to serve the public within that area, isn't that so?

The Court: Are we going outside the Airport itself?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Yes, sir. [154]

Mr. Dyer: Q. What I am trying to get at is this: Whether or not the Airport has no definite service area within which it alone is entitled to serve. Isn't it a fact that any other community having the permission of San Mateo County could locate an airport in San Mateo County?

A. Yes, I presume that they could.

Q. Yes. Now, in studying the charges which you thought should be included in the schedule of rates and charges, did you ever determine how the schedule—how charges were allocated or embodied in—imposed at the Lockheed Airport in Los Angeles?

A. Yes.

Q. That is a private airport, is it not?

A. Yes.

Q. That is not a public utility, is it, sir?

Mr. Thomson: Well, that would be calling for a conclusion of the witness, Your Honor.

The Court: If he knows I will allow it. It goes to the weight of the testimony. If he knows.

A. I do not know.

The Court: All right.

Mr. Dyer: Q. It isn't a municipal airport, is it, sir? A. It is not a municipal airport.

Q. Have you any knowledge of under what agreements with airlines or other arrangements charges are made to airlines [155] at that airport?

Mr. Thomson: Mr. Dyer, what airport are you talking about?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: I am referring to Lockheed at Los Angeles.

Mr. Thomson: Lockheed at Los Angeles? Thank you.

The Court: How many airports do they have down there?

Mr. Dyer: Two. Lockheed and International.

The Court: Both of them are private?

Mr. Dyer: Lockheed is.

The Court: What about the other?

Mr. Dyer: The other, I understand, is under the jurisdiction of the City of Los Angeles.

The Court: All right, proceed.

Mr. Dyer: May I have the question pending, sir?

(Question read by the Reporter.)

A. Well, I am somewhat familiar with the situation down there. I have talked with Mr. Wulfeheuhler and Mr. Katzenhauser, who are the manager and the assistant manager, respectively, of the Lockheed Air Terminal.

They have told me that the Airport was developed by the Lockheed Aircraft Corporation to a great extent——

Mr. Dyer: Q. Mr. Messersmith, just a minute. What I want to know is, under what arrangements charges are made.

A. I am explaining that. —was developed by the Government through certain connections with the Lockheed Air Terminal [156] during the war time when it was necessary for the production of Lockheed Constellations Aircraft to have a place to take

(Testimony of Harold Stanley Messersmith.)  
and test and prove these aircraft. Consequently, they are not confronted with the same problems that we are.

Mr. Dyer: Q. Just a moment.

Mr. Thomson: Just a moment. Let him finish.

Mr. Dyer: If it please the Court, I move to strike all this answer thus far on the ground it isn't responsive. All I want to know is, under what arrangements with airlines are charges made to airlines for use of space and facilities at that airport, if he can.

The Court: I take it he is coming to that.

A. You have to have some historical background to be able to determine these facts.

Mr. Dyer: Your Honor, I submit this question asked for an answer of ultimate fact and not for a great deal of explanation and peroration.

The Court: Do you know the fact?

The Witness: The charges are competitive because the airport a few years ago moved from Burbank to the Los Angeles International Airport, and those people I mentioned before, Mr. Katenhauer stated that in order to attract the airline business back they offered inducement charges to the air carriers. It was an inducement proposition, so that they were not confronted with the problem of maintaining the landing [157] field facilities; that under their arrangement the costs were assumed to a great extent by the Lockheed Aircraft Corporation.

Mr. Dyer: I move to strike all that answer as

(Testimony of Harold Stanley Messersmith.)

not responsive. I simply want to know whether the charges are made under contract or lease or under some other arrangement.

The Court: I will allow the record to stand. Proceed.

Mr. Dyer: Q. Now, will you tell me, at that airport under what type of agreement are charges made to airlines, under contract, lease, or some other type of arrangement?

A. I do not know that.

Q. You never discussed that matter with these people?

A. As I mentioned before, they were inducement rates in order to acquire service at that airport after the airline had moved to the Los Angeles International Airport.

Q. In the course of these rather lengthy discussions with these people you have mentioned at Lockheed you never touched upon the type of arrangement that is used with the airlines, is that what you testify?

Mr. Thomson: He didn't say they were lengthy discussions.

Mr. Dyer: Q. All right, in the course of these discussions?

A. I do not recall that. I may have, but I do not recall.

Q. Now, isn't it a fact that at the Los Angeles International Airport, which is a municipal operation, charges are made to airlines for the use of space and facilities under contract [158] or a lease?



(Testimony of Harold Stanley Messersmith.)

A. Not with their scheduled air carriers. Some of the preferred air companies are on it because they have preferential charges, lease agreements, and others have not.

Q. It is a fact that some of the operating companies at Los Angeles International Airport at the present time do have these lease agreements, is that so, sir?

A. I don't know it to be a fact. I have not reviewed their records.

Q. You referred to various leases at the San Francisco Airport. You also testified, if I am correct, sir, that TWA pays—that no other airline pays under a lease.

Isn't it a fact that United Air Lines pays for the use of space and facilities at the present time under lease with the Public Utilities Commission?

A. I did not testify to the statement you just made, that no other airline operated under a lease. I stated that no other air carrier pays the schedule of rates and charges that is now in existence at the San Francisco Airport.

Q. Does United?

A. United does not, but they pay a higher rate——

Q. Just a moment.

A. ——than does TWA.

Q. Your testimony then, that no other airline—that all other airlines pay under a schedule of rates and charges is [159] not completely correct, is that true?

(Testimony of Harold Stanley Messersmith.)

A. I did not testify——

Mr. Thomson: I object to that. Just a moment, Mr. Messersmith. I object to that as an improper repetition of the evidence. He did not testify there were no other leases at the Airport. He testified various other airlines paid the regular rate according to the schedule of rates and charges.

Mr. Dyer: All right, I will put this question again:

Q. Is United among your designation of all other airlines who were paying under the schedule of rates and charges?

A. I did not—You are telling me that I said all other airlines. I said other air carriers——

Q. (interposing) Some other air carriers?

A. ——pay under the basis of the present schedule of rates and charges. United Air Lines has a lease agreement with the City and they do not pay on the basis of the existing schedule of rates and charges.

Q. They pay under a lease agreement with the City, do they not, sir?

A. They are paying under a lease agreement with the City.

Q. Isn't it a fact that they are the largest operator at the San Francisco Airport of all your scheduled airlines?

A. Yes, it is a fact.

Q. And they have more planes taking off and landing than any other airline at that Airport?

A. Yes. [160]

(Testimony of Harold Stanley Messersmith.)

Q. What is the term of that lease?

A. The term of the lease? Forty years.

Q. You also have a lease agreement with Pan American for the utilization of the space, do you not, sir?

A. Yes.

Q. And that is the second largest operator of the San Francisco Airport, is it not?

A. By second largest operator, in what classification do you mean?

Q. Well, how about volume of traffic?

A. No, they are not.

Q. Are they third?

A. I would have to refer to my figures to tell you just where they are in volume of traffic, but they are one of the major air carriers at the San Francisco International Airport.

Q. Are they presently operating under the terms of that lease?

A. Yes, they are; but they are paying the prevailing rate in the charge schedule for all activities insofar as common use facilities are concerned.

Q. What is the term of that lease, sir?

A. It is for a period of 20 years.

Q. Isn't it a fact that leases were made to the airline for the use of landing facilities before the TWA lease was executed in 1942 at the San Francisco Airport?

A. If my memory serves me correctly, there was one prior [161] lease with a scheduled air carrier.

Q. Isn't it a fact leases were made with sched-



(Testimony of Harold Stanley Messersmith.)

uled air carriers after the lease with TWA was executed in 1942?

A. There was one lease made subsequent to the TWA lease in 1942.

Q. Isn't it a fact that at the present time you are negotiating with airlines for the leasing of space at the San Francisco Airport?

A. That is true. We are conducting preliminary negotiations.

Q. And do those negotiations contemplate the establishment of airline maintenance bases at the San Francisco Airport?

A. Well, I would say they contemplate either operational or maintenance bases at the San Francisco Airport.

Q. And those bases, I take it, would have facilities for maintenance and repair of airlines, would they not?

A. Yes, they would.

Q. And it is contemplated that those airlines will hold that space and operate those facilities under lease with the City, isn't that so, sir?

A. Yes, that is correct. However, they are not incorporated—they will not have incorporated therein any provisions that will freeze the charges for common use facilities.

Q. Yes. Now, Mr. Messersmith, does the Railway Express Agency operate in their express operation at the Airport?

A. Yes, they do. [162]

Q. And that is a carrier such as the airlines,

(Testimony of Harold Stanley Messersmith.)

isn't it? It is a carrier of express instead of passengers, isn't that so?

A. That is correct.

Q. And they serve the general public just as the airlines do, isn't that right, sir?

A. Yes. However, they do not use the common facilities of the airport.

Q. We will get to that. Do they use space at the San Francisco Airport?

A. Yes, they use space that is rented from the City on a space rental permit and they are the tenants of the particular air line.

Q. So they utilize space, this carrier, at the San Francisco Airport under a rental basis at the present time, is that correct?

A. Space that is for their exclusive use, yes.

Q. And I take it they also utilize facilities necessary for the handling of their express, isn't that so?

A. What kind of space do you refer to?

Q. Well, just general space for use of express, and in addition to that utilize handling equipment, and so forth, in handling their express, do they not?

A. On the rented areas, yes.

Q. And the schedule of rates and charges doesn't even purport [163] to apply to that operation, does it, sir?

A. Yes, it does. [163-A]

Mr. Dyer: Q. Can you point to any place in the rates and charges which applies to the utilization of facilities for the handling of express by the Express Company?

A. Yes, the rental of buildings or structures, I

(Testimony of Harold Stanley Messersmith.)

can't recall the part number but it is in our rate and charge schedule.

Q. At the present time it doesn't apply to that, does it? Aren't they renting under a renting agreement that you have described to us?

A. It applies because they are renting space under a rental permit that in this instance has been granted to United Airlines and allows United to act as custodian of a particular building, paved area and unpaved area, and further stipulates that they may sublet that space to other air carriers and to the air express and air mail—that is the Air Express Company and the U. S. Post Office for air mail purposes. All of the various carriers and the Post Office Department and the Air Express Company conduct certain operations in this area that is for their exclusive use; that is, the exclusive use of the custodian and those that he authorizes to use such space.

Q. That is on a lease rental basis?

A. That is on a space rental basis, what may be termed a 30 day revocable permit.

Q. Now, Mr. Messersmith, do Airport limousine companies utilize the common roadways and sidewalk ways at the Airport?

A. Yes, they use the private roadways at the Airport. [164]

Q. That is Airport property, is it not?

A. That is correct.

Q. Just as the ramps and runways are?

A. Yes.

(Testimony of Harold Stanley Messersmith.)

Q. Are there any charges made to the limousine companies for the use of those facilities?

A. Yes; a very appreciable amount of the Airport's revenue is derived from the operations of Airport limousines or bus service to and from the Airport.

Q. Do you have a contract with the limousine companies?

A. We do have a contract with a specific limousine company.

Q. What is the term of that contract?

Mr. Thomson: Well, Mr. Dyer, I will show that contract to you rather than asking for the recollection of this witness as to the term.

Mr. Dyer: I am willing to accept the recollection of this witness subject to any confirmation you may wish to make.

Mr. Thomson: The question is objectionable. I thought I might cooperate if you are interested in this question. Wouldn't you be satisfied with the document?

Mr. Dyer: Your Honor, I think we are going to save time if I simply elicit from this witness the approximate length of the term. That is what I am trying to do.

The Court: What is the length of the term, if you know?

A. The original period was I believe for two years. [165]

Mr. Dyer: Q. Are there also U-Drive Compa-

(Testimony of Harold Stanley Messersmith.)

nics that operate at the San Francisco Airport and utilize the common roadways?

A. There are two U-Drive Companies that have agreements with the Airport, and they pay a stipulated amount per year, or a percentage of their gross profits, whichever amounts to the greater, for the privilege of conducting business at the San Francisco Airport.

Q. Is that privilege obtained from the Airport authority by way of contract?

A. It is obtained from the Public Utilities Commission.

Q. By way of contract?

A. By way of contract.

Q. And what is the term of that contract, to the best of your recollection?

A. Three years.

Q. And you also lease facilities or make facilities available to the Telegraph Company at the Airport, do you not, sir?

A. Yes, we do.

Q. And are those facilities made available under agreement or contract?

A. The agreement provides that they pay us 40 per cent of the gross receipts that we collect; that is, our employees. We actually operate the agency for the Western Union Telegraph Company. [166]

I may say that all of these various activities that you are mentioning go toward making it possible for us to lower the cost of operating the Airport for the taxpayer, however not sufficiently to offset the deficit.



(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: If the Court please, I will move to strike that volunteered statement as not responsive.

The Court: It may go out.

Mr. Dyer: Q. Has the Telephone Company also utilized a certain small amount of space for the use of its telephone pay stations?

A. Yes, for the exclusive use of their patrons.

Q. Their patrons are any members of the public that come into the Airport, isn't that so?

A. That is correct; they pay us——

Q. Pardon me; had you finished?

A. They pay us 15 per cent of the gross receipts from all amounts taken in.

Q. Those public pay stations are public space and common facilities available to any member of the public that wishes to use them; isn't that correct?

A. For the exclusive use of their patrons.

Q. How is that space made available to the Telephone Company; on a contract or lease?

A. I do not have a copy of the document. I do not think there is one in possession of the Airport Department. As I [167] understand that, it is a comprehensive agreement that covers all city owned buildings. It is credited to the Airport revenue.

Q. To the best of your knowledge it is an agreement that makes available to the Telephone Company these facilities and this space which is available to the members of the Public, is that correct?

A. To the best of my knowledge, yes.

Q. You mentioned a parking lot. That parking

(Testimony of Harold Stanley Messersmith.)

lot obviously is for the storage of any car that comes there, isn't that so?

A. That's right; it is for the exclusive use of the parking lot concessionaire, and he is given the authority to park cars at a stipulated rate there. He pays the City, first of all, an amount for the use of the property involved; and, secondly, it was on a competitive bid basis, and he bid 67½ per cent of his gross receipts, and he pays for all electric energy consumed on the premises.

Q. That space for the storage of cars, of public cars for any member of the public, is made available to the operator by way of contract or agreement or lease, isn't that so?

A. Yes, he has the exclusive use of the property and it is an exclusive agreement.

Q. How many businesses in all operate at the Airport, Mr. Messersmith, approximately?

A. There are several more; I don't know the number exactly; [168] I would merely be guessing. I would like to examine our accounts receivable and other records before I would say how many.

Q. Can you give us your best estimate?

The Court: Approximately.

A. Approximately 12.

Mr. Dyer: Q. They all serve the general public, do they not?

A. Yes, they are all—in all instances provide space for the concessionaire or lessee, who in turn serves the public.

Q. And they are able to serve that public under

(Testimony of Harold Stanley Messersmith.)

agreements of contract or lease with the City, isn't that so?

A. Under contract, not necessarily under lease.

Q. Under agreement of one type or another.

Now, Mr. Messersmith, I notice that you testified that military planes pay no fee for landing and taking off at the Airport; is that correct?

A. That is correct.

Q. And do planes operated by the City in its business capacity pay any fee?

A. We haven't had any operated by the City, so that has not occurred. However, I believe there is an exemption.

Q. There is an exemption for City planes?

A. City owned, if they are operated by the Public Utilities Commission. [169]

Q. How about planes operated by the C.A.A?

A. I believe the C.A.A. is excluded from charges.

Q. Your schedule of rates and charges has a provision for the use of an entire building, does it not?

A. That is correct.

Q. And that rate schedule right in the rate schedule speaks of a lease, does it not?

A. I would have to refer to the rate schedule to see what the exact wording is. I don't recollect that.

Mr. Thomson: Mr. Dyer, it might be helpful if I gave you this announcement: That my contentions in this case are confined to the common use facilities.

Mr. Dyer: Your Honor, of course that isn't the



(Testimony of Harold Stanley Messersmith.)

issue raised by the pleadings. They question all the charges applicable to TWA under the lease; and in addition, of course, it is our contention that in the very schedule or rates and charges they purport to impose rates and charges for the use of obvious rental space, such as the use of an entire building under agreement.

Mr. Dyer: Q. Mr. Messersmith, I show you Part 4 of the 1951 schedule of rates and charges.

The Court: Page?

Mr. Dyer: Page 4. That is entitled "Rental of An Entire Building or Structure," is it not?

A. That is correct. [170]

The Court: Pardon me; I'm trying to follow you.

The Witness: Part 4.

Mr. Dyer: Part 4, page 4, Your Honor.

Mr. Dyer: Q. That is entitled "Rental of an Entire Building," is it not, Mr. Messersmith?

A. Yes, it is.

Q. And there is a provision in Section 1 for sub-letting, is there not?

A. That is right, providing any arrangement for sub-letting have the prior approval of the Commission.

Q. Do you consider the rental of an entire building and a provision for sub-letting thereof a Public Utility rate—the proper subject for a Public Utility rate?

Mr. Thomson: I object to that upon the ground that it calls for the conclusion and opinion of the witness on a matter of law, Your Honor.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Your Honor, the claim in this case is that all these matters in the schedule of rates and charges are Public Utility rates. This man is the man who has worked on the schedule of rates and charges for the City. Now we would like to inquire as to the factors which motivated him or the City to determine that all of these various things in the schedule of rates and charges are Public Utility rates.

The Court: If he knows, he may answer.

The Witness: I do not know. [171]

Mr. Dyer: Q. You worked on the schedule of rates and charges, didn't you, Mr. Messersmith?

A. The schedule or rates and charges was predicated on cost factors. The legality, as to whether or not they are a Public Utility rate, was not for me to determine.

Q. Were you advised by any representative of the City when you worked on this schedule of the rental of an entire building and a provision for subletting that it was a proper subject to be included in a rate schedule?

A. I prepared the preliminary drafts of the particular schedule of rates that you are referring to.

Q. I do not believe that answer is responsive. Did you receive the advice I have adverted to from any member of the City, any representative of the City?

A. Yes, I was advised by the manager of Utilities to work on the preparation of a rate and charge

(Testimony of Harold Stanley Messersmith.)

schedule applicable to all of the facilities at the San Francisco International Airport.

Q. I notice that his part of the rate schedule applies to the rental of an entire building or structure or rental of a partial building or structure. Are there any other buildings on the Airport which are made available to business operators at the Airport on a lease basis and not under the schedule of rates and charges?

A. There are, yes, to United Airlines and Pan American. [172]

Q. What is the factor that determines that in one instance rental of an entire building should be under a rate schedule and in another instance it should not? What is the distinguishing factor?

A. In recent years, or since the adoption of the 1946 and 1950 schedules of rates and charges, there has been no distinction.

Q. The United lease was entered into after the adoption of the 1946 schedule, was it not, Mr. Messersmith?

A. Yes, in 1947. However, there were no buildings that the City had constructed entirely with their own funds involved in that lease.

Q. But that lease not under the schedule of rates and charges was entered into with United after a schedule of rates and charges was in existence, is that not so?

A. That is correct; and at that time the basic lease was changed to increase the acreage charge

(Testimony of Harold Stanley Messersmith.)

that United paid so that it would be consistent with the schedule or rates and charges.

Q. But that lease was for a definite term, was it not?      A. Yes, it was.

Q. For a term of years?      A. Yes, it was.

Q. How many years?      A. 40 years.

Q. I show you Part 4 of the schedule or rates and charges, [173] page 6, Section 3. Will you read that Section please?

A. (Reading) "Rental as defined shall mean general acreage acquired under agreement with the Public Utilities Commission."

That refers to rental of Airport property unimproved.

Q. Well, now, properly, Mr. Messersmith, is that rental of property or is that a provision for the rental of property under agreement or lease, or is it the provision of a Public Utility service subject to a rate?

Mr. Thomson: If Your Honor please, I think that is purely a legal question that this witness should not be called upon to answer.

Mr. Dyer: This man is the chief man who worked on the schedule of rates and charges. I thank I am entitled to inquire into the extent of his knowledge.

The Court: Read the question, Mr. Reporter.

(The reporter read the question.)

The Court: You may answer, if you know.

A. I do not know.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Q. Did you write this Part 6 of the schedule of rates and charges? A. Yes, I wrote it.

Q. And did you make any determination or give any thought to the question at the time of whether or not rental under agreement for a definite term was a Public Utility service? [174]

Mr. Thomson: If your Honor please, that is a repetition of the same objectionable question. It calls for a legal opinion of this witness.

Mr. Dyer: He said he didn't know to the last question. I am asking him now if he gave any consideration to it.

Mr. Thomson: Well he says he doesn't know.

The Court: Can you answer the question?

The Witness: Would you repeat the question, please?

Mr. Dyer: May we have it read, please?

(The reporter read the question.)

A. No.

Mr. Dyer: Q. Now will you look at Part 7, page 7 of the 1951 schedule, Mr. Messersmith. What does that refer to?

A. Rental of Airport property, paved areas.

Q. Isn't it a fact that those paved areas are made available to airlines under agreement?

A. This and the other two parts that I have just referred to is property that is not considered common use property at the Airport but that which could be made available for the exclusive use of a tenant. Would you repeat your question if I didn't answer it? [175]



(Testimony of Harold Stanley Messersmith.)

Q. Paved areas are made available under agreement, are they not, in accordance with the schedule of rates and charges?

A. Yes, they are.

Q. For a definite——

A. However, not for a definite period of time. It is merely on an operator's rental permit that is subject to cancellation by the Public Utilities Commission.

Q. Will you, then, read the first sentence of Section 2?

A. (Reading): "Rental rate for general acreage shall be \$600 per year for the following: First, for the ground——"

Q. Yes. If you wanted to rent——

The Court: Let him read it all.

A. (Reading): "Certain \$600 a year minimum charge and/or an acreage charge shall be applicable on a consolidation basis to all charges set forth in Part 6 and Part 7."

Mr. Dyer: Q. That refers to a unit charge of \$600 a year, does it not, sir?

A. Yes. A minimum unit charge.

Q. But it is for the year.           A. Yes.

Q. I notice that Section 3 of this Part 7 reads: "Rental so defined shall mean general acreage acquired under agreement with the Public Utilities [176] Commission". By "agreement" do you mean leasing there, sir?

A. Not necessarily. It can mean a space rental permit or a lease that has been granted as a result

(Testimony of Harold Stanley Messersmith.)  
of competitive bidding as required by the City Charter.

Q. Now, I notice that Part 9, page 9, of the schedule of rates and charges, refers to rental rates for domestic and international passenger air terminal office building space, does it not?

A. Yes, it does.

Q. Now, that schedule, then, refers to the leasing of office space, isn't that so?

A. That is correct.

Q. Is office space made available to various non-aviation business operators at the Airport?

A. Yes. The Telephone Company is one. TWA, also, in the International Terminal Building occupies space under those provisions.

Q. I notice that Section 2 provides that the tenants—that word is used—must maintain the physical improvements in good condition.

Mr. Messersmith, isn't it a fact that Public Utilities in providing service have an obligation to maintain total facilities, to provide the maintenance?

Mr. Thomson: If your Honor please, I object to that as [177] calling for a conclusion of law upon the part of the witness.

Mr. Dyer: Again, this witness is——

Mr. Thomson: Ostensibly a bare question of law, nothing else.

Mr. Dyer: I am asking if this man knows.

The Court: If you know.

A. They are required to maintain the premises to varying degrees. There is a differential in the

(Testimony of Harold Stanley Messersmith.)

rates whether you occupy an entire or a partial structure, and there the responsibilities of the tenant varies. He has a lower rate where the responsibilities are lower.

Q. Now, Mr. Messersmith, I am not sure that that is responsive. Do you know whether or not recognized utilities such as the Telephone Company provide all maintenance in the provisions of their service as an obligation of the company?

A. Not in dealing with the City and County of San Francisco. The Western Union and the Telephone Company require us to do certain maintenance of their facilities for which we are paid a percentage of gross receipts, along with the payment for the privilege of conducting business there.

Q. I take it that that answer is not predicated upon an examination of the files of public tariffs of the Telephone Company, is it?

A. It is taken upon the contract that we have with Western Union. [178]

Q. With Western Union?

A. Which is a Public Utility.

Q. Part 9, I notice, has a heading, "Delivery of Aviation Fuels". Isn't it a fact that in certain instances the Airport sets itself up as a dealer of aviation fuels?

A. Yes, that is correct.

Q. And that dealership is referred to in the schedule of rates and charges, is it not?

A. Yes, it is.

Q. Doesn't the Airport also make space and fa-

(Testimony of Harold Stanley Messersmith.)

cilities available to petroleum companies for the provision of fuel to automobile owners?

A. For the provision of fuel to automobile owners?

Q. Yes.

Mr. Thomson: Automobile owners?

Mr. Dyer: Yes.

A. No, it hasn't to date.

Mr. Dyer: Q. It contemplates it will, does it not?

A. Oh, yes, we have—we are now negotiating or anticipating the consummation of an agreement for the operation of a service station on Airport property.

Q. And that charge to the member of the public who owns an automobile and comes into the Airport to obtain fuel will not be based on the schedule of rates and charges, will it, sir?

A. The basic charge is on a competitive bid basis. The [179] various petroleum companies were invited to bid for it, and the high bid happened to be—the highest bidder is being awarded, I understand, the contract for the installation at a cost of \$50,000 or more of a service station at the Airport.

Q. With reference to that, isn't it a fact that the TWA lease was entered into after bids were received? A. Yes.

Q. To get back to my question, isn't it a fact that the charge for gasoline to the automobile users at the Airport who come in, public automobile users, is not based on a schedule of rates and charges?

A. It is an amount in excess of the schedule of

(Testimony of Harold Stanley Messersmith.)

rates and charges. The first consideration of the minimum amount would be predicated on the schedule of rates and charges.

Q. I don't think you get what I mean, Mr. Messersmith. I am referring to the charge to the individual automobile owner. Suppose I came into the Airport and asked for a certain number of gallons of gasoline, the charge charged me wouldn't be based on the schedule of rates and charges, would it?

A. No, it would not. However, in the case of parking your automobile it would be.

Q. Yes.

A. There are various agreements down there at the Airport.

Q. Now, Mr. Messersmith, I notice that throughout this schedule of rates and charges you have references to agreements, [180] to subleases, and so forth. Isn't it true that if these matters were involved the provisions of a projected service, that no lease or agreement would be necessary? Isn't a consumer of a utility entitled to service as a matter of right?

Mr. Thomson: If your Honor please, I object to that again as a question of law.

The Court: Objection will be sustained.

Mr. Dyer: Q. Now, Mr. Messersmith, in planning the expansion of the Airport, isn't rather long-range planning necessary?

A. Yes, it is.

Q. And doesn't that long-range planning involve



(Testimony of Harold Stanley Messersmith.)

a forecast of numbers and the types and weights of planes that will use a field in the future?

A. Yes, it does. And it requires the cooperation of the air carriers concerned. Now, we endeavored to recently acquire data upon which to forecast a prospectus of traffic. We asked for it by individual air carrier and as to the type of aircraft that they contemplate, and the volume of movements.

They sent us back a semi-logarithmic chart which said that you can anticipate the same amount of increase in traffic at the San Francisco Airport as the C.A.A. had projected three or four years back for the United States.

We find it very unsatisfactory, and not in accord with giving us the information necessary to make total planning. [181] Consequently, we have to analyze the subject using our own conception as to what the requirements will be.

Q. Well, you seek to obtain your information from the sources that may be of help, do you not?

A. That is true, certainly.

Q. Now, what forecasts were made by the City in 1942 and prior thereto concerning the weight of planes that would come into commercial use at the San Francisco Airport?

A. Well, it is rather difficult to pin it down to any exact period of time because, as you know, an airport is continually undergoing expansion. We have had four or five complete airport developments down there to take care of the changing type of aircraft that was placed into service.

(Testimony of Harold Stanley Messersmith.)

In 1941 or 1942—that was just after Pearl Harbor—we had a tremendous acceleration in the growth of air transportation brought about by the war. We then had ultimate plans in 1942 for that 4,500 foot North-South runway and for the 6,000 foot East-West. However, there was a considerable change right at that particular time, in 1942 and 1943, in our thinking, and we were then able to realize that larger aircraft were going to be operated from the Airport and we laid our plans accordingly.

Q. I wish to get this clear: In 1942 you did have a contemplation of larger planes coming into use, and accordingly the 6,000 foot runway was planned, is that so? [182]

A. The 6,000 foot runway, I testified earlier, was in service. However, it wasn't capable of sustaining the heavy loads of aircraft that later were developed.

Q. Isn't it a fact that an 8,000 foot runway was also contemplated or planned or discussed about that time?

A. It is possible that we did discuss it. We didn't know whether it would ever be realized, but it may have been discussed or considered.

Q. When was the 8,000 foot runway started? When was it constructed or planned? When was the construction or plans for it definitely started?

Mr. Thomson: Did you say construction or plan?

Mr. Dyer: Either one or both.

Mr. Thomson: I object to that upon the ground the question is complex.

(Testimony of Harold Stanley Messersmith.)

The Court: Change the form of the question.

Mr. Dyer: I will simplify it.

Mr. Dyer: Q. When was the 8,000 foot runway definitely planned?

A. Well, prior to 1945 when the electorate passed the general operation bond in the amount of \$20,000,000.

Q. How long before 1945?

A. Possibly two or three years.

Q. Possibly two or three years? So on the basis of that, that 8,000 foot runway would have been planned in 1943 or 1942? [183]

A. That is just what I indicated. There was a tremendous growth in aviation right at that time. The growth was so great that we have accomplished in 10 years what may normally have been anticipated over 20 years or more.

Q. Yes. Now, Mr. Messersmith, I am going to refer you to the allegations contained in the City's answer and cross-complaint which states as follows. This is page 13:

"These defendants and cross-complainants further allege that there wasn't on said date——" referring to October 1, 1942——

"——any conception in the minds of any officers, or representatives, that either of the parties to said document of public lease, that commercial aircraft would ever within the purported term of said purported lease exceed to any appreciable extent said maximum permissible take-off weight."

On October 1st, 1942, did you have any concep-

(Testimony of Harold Stanley Messersmith.)

tion that within the period of 20 years from that date planes in excess of 25,000 pounds gross take-off weight would ever come into commercial use?

A. Yes, we anticipated that the Boeing Stratoliner, which TWA later operated, would be placed into service. I believe that airplane weighed approximately 47,000 pounds.

However, we did not anticipate that there would be any large volume of numbers of that aircraft because TWA only [184] purchased three or four for their entire system.

Q. Despite this allegation, then, you did on October 1, 1942, have a conception that planes of at least 47,000 pounds were coming into use, is that so?

A. Into limited use, yes.

Q. Yes.

A. Right. However, our facilities would not be able to accommodate a repetition of use of such extraordinarily heavy aircraft.

Q. Isn't it a fact, Mr. Messersmith, that about five years before 1942 you had a conception that four-engine planes would come into use?

A. Well, yes, there had been other four-engine aircraft that had been in operation but had proven satisfactory by the scheduled air carriers.

Q. When did you first know of the Boeing Stratoliner?

A. Prior to 1942.

Q. How long prior to 1942?

A. I would only be guessing, but it was prior to 1942.

Q. Mr. Messersmith, I have here the report of



(Testimony of Harold Stanley Messersmith.)

the San Francisco Public Utilities Commission for the year 1936-1937. I show you page 165, and a picture on that page. Will you describe to the Court what you see?

A. "Transport Plane of the Future."

Q. How many engines does it have? [185]

A. Four engines.

Q. And what does the caption under that picture say?

A. (Reading): "Cutaway view showing type of transport plane now under construction for Transcontinental and Western Air. Will carry 33 passengers and a crew of four."

Q. Do you recognize that type of plane?

A. Yes, that was a plane that had 50 per cent more capacity than the one that was being operated at that time.

Q. And do you know what weight that plane was?

A. I mentioned before that it was approximately 47,000 pounds.

Q. So that at least five years before the execution of this lease the city, by its report, had knowledge of a 47,000 pound, four-engine plane, is that correct?

A. We had knowledge that it was being constructed. We had no knowledge that it would be a success because other four-engine airplanes didn't prove to be successful. That was still considered experimental. It was several years later that the



(Testimony of Harold Stanley Messersmith.)

airplane was licensed by the C.A.A. and placed in service.

Q. Wouldn't you say from the picture and the designation that appears in this 1936 report that the City contemplated that it would come into commercial service?

A. I would say that we endeavor to get the latest thing on airlines at all times, and that that indicated the latest [186] thinking and that which TWA anticipated.

Q. That was your contemplation at the time of the type of plane that might come into use, is that so?

A. Into very limited use, yes.

Q. Commercial use?

A. Into very limited use. But our facilities at that time consisted of runways that were only 3,000 feet in length, and in 1938 we went before the electorate and were successful in obtaining a bond issue in the amount of \$2,850,000 in general operation bonds in order to expand the Airport to take care of the projections that had been made by the scheduled air carriers.

Q. And that 1938 bond issue which increased the runways was, again, four years before the leasing, was it not?

A. The accomplishment of the work was two years before.

Q. And that bond issue was voted four years before?

A. Yes.

Q. Now, Mr. Messersmith, I show you the report of the San Francisco Public Utilities Commission

(Testimony of Harold Stanley Messersmith.)

of 1937-1938, or approximately four years before the execution of the lease. Will you please read to the Court this paragraph which appears at the top of page 201.

A. (Reading): "The new Boeing Stratoliner now under construction will be the first transport built in the perfectly streamlined shape of an elongated [187] 'teardrop', following nature's own design for a particle traveling through air with the least possible resistance. This big 4-motored ship will have a total of 4,400 horse power, will carry 33 passengers plus a crew of four, and 3,700 pounds of air mail and express. The cabins will be sealed to permit the use of pressure regulating equipment at high 'over weather' flying levels. Gross weight of the craft will be 42,000 pounds. Its wings will measure 107 feet from tip to tip, and its fuselage will be 74 feet in length. In 'upper level' flying it will travel at speeds around 250 miles an hour.

"First of the new 'Stratoliners' is scheduled for completion during the late summer of 1938."

Q. You knew, then, by your own official report, that the Stratoliner would be completed about four years before the lease was executed, is that right, sir—in 1938?

A. Yes, we knew that a limited number—or this one airplane, would be built, right.

Q. Do you see any reference to the DC-4 in that report?

A. Douglas DC-4, yes.

Q. How heavy an airplane was that?

A. It does not say. I believe this was the first

(Testimony of Harold Stanley Messersmith.)

Douglas DC-4 that was proved unsatisfactory in this country. It had [188] inadequate horse power and was sold, I believe, to Japan.

The Court: Take an adjournment to 2:00 o'clock.

(Whereupon an adjournment was taken to the hour of 2:00 o'clock p.m. this date.) [188-A]

### HAROLD STANLEY MESSERSMITH

was recalled as a witness on behalf of the defendants, previously sworn:

#### Cross Examination—(Continued)

The Court: Proceed.

Mr. Dyer: Q. Mr. Messersmith, when we took the noon recess you had identified in the 1937-1938 report of the Public Utilities Commission statements concerning the Boeing Stratoliner and the DC-4.

Mr. Dyer: If the Court please, at this time I ask that this document be marked for identification.

The Court: Let it be admitted and marked.

Mr. Dyer: And I will ask that that portion of that document entitled "San Francisco Airport" which is a specific chapter therein, be admitted in evidence.

The Court: So ordered.

The Clerk: Plaintiff's Exhibit 6 marked for identification.

Mr. Dyer: In evidence.

The Clerk: Where is that particular part, counsel?

Mr. Dyer: I will point it out to you, Mr. Clerk.

(Testimony of Harold Stanley Messersmith.)

It is the chapter entitled "San Francisco Airport", which extends from page 193 to page 228.

The Clerk: Plaintiff's Exhibit 7 admitted and filed in [189] evidence.

(Thereupon PUC Report 1937-38 referred to above was marked Plaintiff's Exhibit No. 6 for identification; and pages 193-228 thereof, entitled "San Francisco Airport" was received into evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Dyer: Q. Mr. Messersmith, you stated that you had in contemplation that DC-4 planes would come into use as early as 1937-1938. I show you this photograph. Would you please state what it purports to represent?

A. A DC-4 airplane of Trans World Airlines supplied through the courtesy of TWA.

Mr. Dyer: I will ask that this document be marked for identification and I will also offer it in evidence.

The Court: Let it be admitted and marked in evidence.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Thereupon photograph of Boeing Strato-liner was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. Dyer: Q. Now, Mr. Messersmith, if I recall your testimony correctly, you stated that the weight of the DC-4 plane was in the neighborhood of 54,000 pounds; is that correct?

A. Yes, 54,000 pounds, of standard gross weight

(Testimony of Harold Stanley Messersmith.)

was presumed to be the weight of the airplane at that time.

Q. Was that the maximum take-off weight or landing weight? [190]

A. That would be the landing weight at that time. Later the aircraft was developed into a heavier aircraft.

Q. I think we have been talking generally and the pleadings refer to the gross take-off weight. Will you give us your estimate of the gross take-off weight of that aircraft at that time?

A. The provisions of the lease refer to the standard gross weight of the aircraft; consequently I have been conforming to the standard gross weight of the aircraft in stating the weights of aircraft, not the maximum weight at take-off, because the lease doesn't refer to such weights.

Q. All right; I will put it to you this way: What was the maximum take-off weight to the best of your recollection of that airplane at that time?

A. At what time?

Q. In 1938 when you first obtained notice of it.

A. I had no knowledge of the operation by a scheduled air carrier of any DC-4 in 1938. I don't think any——

Q. Did you have—pardon me, sir.

A. I don't think any air carrier had operated a DC-4 airplane in those days. I think the photograph there that was presented here in evidence was most likely taken subsequent to 1942 and is not indica-



(Testimony of Harold Stanley Messersmith.)

tive of the airplane that you refer to as our having knowledge of in 1936 and 1937.

Q. Does the airplane represented by this photograph have the [191] same general air frame as the airplane which you have described and which you had notice of in 1938?

A. You are referring to the experimental DC-4 that was sold to Japan?

Q. I am referring to the airplane which is referred to in the Public Utilities report which is in evidence.

A. I had no specific figures as to the rate of the first experimental DC-4 airplane. I understood it to weigh somewhere between 54,000 and possibly 65 or 70,000; but I have no published weight data on that specific airplane.

Q. Your contemplation of the weight was within the range stated by you, between fifty-four and say sixty-five thousand or so, is that correct?

A. The contemplated weight was fifty-four to sixty-five thousand pounds. However, the knowledge of the weight of that aircraft was not forthcoming—that is, definite knowledge was not forthcoming until after the aircraft had been certified by the Civil Aeronautics Authority and that was along about 1942, I would judge, or 1943.

Q. That plane was a heavier plane than the Boeing Stratoliner which is referred to in the answer and cross-complaint, was it not?

A. Are you now referring to the first conception of a DC-4 which went to Japan, or are you refer-

(Testimony of Harold Stanley Messersmith.)

ring to the one that was actually placed in airline service. There is quite a span [192] of years between the two.

Q. I am referring to the plane which you first had notice of in 1938 and 1939 and also the one which I understand was put in service. I understand they are one and the same plane.

A. There was quite a bit of discussion on that subject. As a matter of fact, there was a conference in the office of the manager of the Airport about 1937-38 when the question arose as to the practicality of an airplane of the size of a DC-4, and there was considerable question as to whether the scheduled airlines would actually operate airplanes that large, and if they did it was indicated that they would be under circumstances of long-range operations and very limited number of movements.

Q. What weights did you discuss at that time?

A. The weights that I recall I believe approximated 54,000 pounds.

A. A year later in the report of 1938-39 of the Public Utilities Commission did not the Public Utilities Commission during the fiscal year 1938-1939 have definite knowledge that the Boeing Stratoliners and the Douglas DC-4 planes would be used commercially?

A. No; we had definite knowledge that they were—that the Boeing Stratoliner was contemplated for use, but we had no assurance that they would operate in and out of the San Francisco Airport.

(Testimony of Harold Stanley Messersmith.)

Q. You had definite knowledge that those planes had been built, had you not?

A. Yes, but we had no definite knowledge that TWA would be certificated to operate in and out of the San Francisco International Airport at that time.

Q. You had definite knowledge that it was entirely possible that the certificated airlines would use that type of equipment, did you not?

A. We could have anticipated that a limited number of scheduled flights by aircraft of that weight would possibly be operated from our Airport, but we did not have facilities that would accommodate them.

Q. I show you page 192 of the 1938-9 report. What does heading of that paragraph state, sir?

A. "Four-motored transports to be used by airlines."

Q. And what planes are referred to in the paragraph under that heading?

A. "Four-motored transports to be used by airlines. Plans for the use of four-motored transports by the airlines are progressing rapidly. Both of the lines using San Francisco Airport are definitely contemplating this important step. United Air Lines has ordered six Douglas DC-4 transports, thirty-two and one-half ton planes which carry 42 passengers and a crew of five. Transcontinental & Western Air plans to use Boeing [194] Stratoliners, 21-ton planes to carry 33 passengers and a crew of four. Both of these transports are built for high

(Testimony of Harold Stanley Messersmith.)

altitude, substratosphere flying, with hermetically sealed cabins being supplied with circulating air at pressures experienced at ordinary flying levels, and comfortable temperatures. The ships can thereby take advantage of the greater speeds possible in the rarefied regions of the upper atmosphere, and likewise surmount the storm areas which cause many delays in flying at lower levels.”

The Court: Fix the time on that.

Mr. Dyer: This is contained, sir, in the Official Report of the San Francisco Public Utilities Commission for the fiscal year 1938-1939.

The Witness: That is correct. The Stratoliner that was referred to there was first placed in service in approximately 1944.

Mr. Dyer: If the Court please, I will ask that this document be marked for identification.

The Court: Let it be marked.

Mr. Dyer: And I will ask that the chapter therein entitled “San Francisco Airport,” which extends from page 184 to page 224, be admitted in evidence.

The Court: So ordered. [195]

The Clerk: Plaintiff’s Exhibit 9 marked for identification; Plaintiff’s Exhibit 10 admitted and filed in evidence.

(Thereupon PUC Report 1938-39 was marked Plaintiff’s Exhibit No. 9 for identification only; the chapter thereof entitled “San Francisco Airport”, pages 184-224, was received in evidence and marked Plaintiff’s Exhibit No. 10.)



(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Q. Mr. Messersmith, I am going to refer you to a letter, and I have checked its authenticity with Mr. Thomson. It is a letter addressed to the Public Utilities Commission by Mr. E. G. Cahill, Manager of Utilities, and it is dated August 4, 1937, and its subject is the San Francisco Airport Bond Issue. I am going to ask you to read the fourth paragraph in that letter, of August 4, 1937.

A. "With regard to the land plane port, a radical revision has taken place in the design and operation of land type aircraft. Two years we were faced with the airport operating problem of aircraft weighing from 17,000 to 20,000 pounds. Today land planes weighing 24,000 pounds are operating in and out of San Francisco Airport, and there are now being built land planes to be put in service next year, weighing 42,000 pounds, with other designs projected that will weigh close to 70,000 pounds."

The Court: What is the date of that?

The Witness: August 4, 1937. [196]

Mr. Dyer: Q. That is a letter, is it not, from Mr. Cahill to the Public Utilities Commission? It is a copy of a letter?

A. Yes, that is a letter, and it is the estimate on the capital cost, which may be important too, for——

Mr. Dyer: Your Honor, this is a copy of a letter and I have endeavored to obtain the original, but Mr. Thomson tells me it is hard to discover the



(Testimony of Harold Stanley Messersmith.)

original and he has agreed, I believe, to stipulate to its authenticity. Is that correct, sir?

Mr. Thomson: That is correct, Your Honor.

The Court: Let the record so show.

Mr. Dyer: I will therefore offer this copy in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

(Thereupon letter identified above was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Dyer: Q. Now, Mr. Messersmith, do you recall when TWA put in commercial service in the United States the Boeing Stratoliner?

A. To the best of my knowledge it was just prior to the beginning of World War II, and I understand the aircraft were taken over for military purposes and turned back to the airline at a later date. [197]

Q. Do you have a recollection that the Boeing Stratoliner was put in commercial service before the date of the execution of this lease in '42?

A. I believe I recall reading that TWA had purchased three or four of the airplanes prior to that date and had placed them into service.

The Court: What date?

The Witness: Prior to November 1942.

Mr. Dyer: Q. Do you recall reading that in the 1939-1940 report of the Public Utilities Commission?

A. Which year was that?

(Testimony of Harold Stanley Messersmith.)

Q. The fiscal year 1939-1940?

A. Well, I wouldn't necessarily recall the exact date.

Q. To refresh your recollection on the exact date, Mr. Messersmith, I show you this report of the San Francisco Public Utilities Commission for the fiscal year 1939-1940. Will you please read the heading on page 196 indicated by me and the paragraph thereunder?

A. "Era of four-motored transports inaugurated.

"In June 1940 this airline set a precedent among the domestic airlines of the nation by inaugurating the service of four-motored Stratoliners. These huge 21-ton transports, carrying 33 passengers and a crew of five, are now in regular service between Los Angeles and New York. The company has a petition [198] pending with the Civil Aeronautics Authority, requesting permission to extend its New York to Los Angeles route on to San Francisco Airport. If the request is granted, the Stratoliners will be operated into this field. At the present time all east bound Stratoliner passengers are routed by way of Los Angeles, flying south from San Francisco Airport via United Air Lines."

Q. Have you concluded, sir, with that paragraph? A. That paragraph, yes.

Q. That refers specifically to the commercial use of Boeing Stratoliners by TWA, does it not, Mr. Messersmith? A. That is correct.

Q. During the fiscal year 1939-1940?

(Testimony of Harold Stanley Messersmith.)

A. That is correct.

Q. At least two years before the lease was executed?

A. That is correct.

Mr. Dyer: If the Court please I will ask that this document be marked for identification.

The Court: Let it be marked.

Mr. Dyer: And I will further ask that that portion of the document entitled "San Francisco Airport" which extends from page 186 to page 215 be received in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 marked for identification; [199] Plaintiff's 13 admitted and filed in evidence.

(Thereupon PUC Report 1939-40 was marked Plaintiff's Exhibit No. 12 for identification only; the chapter thereof entitled "San Francisco Airport", pages 186-215, was received into evidence and marked Plaintiff's Exhibit No. 13.)

Mr. Dyer: Q. Mr. Messersmith, isn't it a fact that the trend in weight of planes in use at the San Francisco Airport and other municipal airports has steadily increased as to weight and as to wing loadings?

A. Yes, that is a fact.

Q. Isn't it a fact that there never has been any down dip in that trend to any extent?

A. No, that is not a fact.

Q. When was the down dip?

A. There has been deviations.

Q. During the war?

(Testimony of Harold Stanley Messersmith.)

A. No, prior to the war there were larger transports built, and Boeing built a Boeing 80, which was operated by the airlines and subsequently the trend was downward to smaller transports. Then they introduced bi-engine transports, and the trend went the other way. There has been a few variations, but generally I agree that the trend has been upward.

Q. Yes, the general trend. Now, Mr. Messersmith, am I correct in my recollection of your testimony that the use of the field during the war by the Military was rather intermittent, [200] or am I incorrect in that recollection?

A. No, I did not—I said the use of the field by heavy type of transport planes falling into the category of say 47,000 to 63,000 pounds was very limited.

Q. And you are referring then to the limited use of the airport by heavy military planes during the war?

A. That is correct. The use of the field during the war by military aircraft was accelerated after the Federal Government had lengthened the prevailing runway as partial payment for the Treasure Island Airport. At that time they strengthened it to a degree and lengthened the runway to 7,000 feet, and they provided connecting taxi-ways to the now-existing Pan American base. It was only then that those heavier transports could be operated from the airport with any frequency in safety. That was only on a specific runway—one runway,



(Testimony of Harold Stanley Messersmith.)

and on a specific set of taxi-ways running to and from the Pan American Airway. They did not strengthen the balance of the facilities in the areas that were used by scheduled airlines, in getting to and from the operating areas in which they were located or where they loaded their passengers.

Q. Mr. Messersmith, do you have a recollection that during the year 1943-1944 before the Constellations were put in use that there was a rather frequent use of the heavier and larger types of military aircraft at the San Francisco Airport?

A. By heavier and larger type, exactly what aircraft are you referring to?

Q. Those utilized for say cargo activities and evacuation of wounded activities, four-engined aircraft that could fly the Pacific.

A. There was some use of the Aircraft by them in connection with the United Air Lines, and possibly Pan American World Airways. However, almost concurrent with that, we had a project under way with the Federal Government to both lengthen and strengthen the runways and taxi-ways that they would be required to use. However, those were limited operations for military purposes, and we naturally anticipated that we would have an accelerated deterioration of our facilities during the period, but there was a war on and of course no effort was made to forestall that type of operations. In addition, the Federal Government had agreed to pay for any damage sustained through the use of the Airport facilities during that time.



(Testimony of Harold Stanley Messersmith.)

Q. During that time in 1943-1944, isn't it a fact that the use of the runways by TWA Boeing Stratoliners was rather infrequent?

A. Approximately 30 to 60 movements per month. Pardon me; approximately 60 to 120. That would be one to two a day.

Q. I didn't want to have misled you, and I may have been guilty in that respect, but to recall the facts in this case [202] as they have been brought out, isn't it a fact that it wasn't until April 1945 that Boeing Stratoliners were put in use at this Airport?

A. If you will allow me to refer to our report, I can tell you.

Q. Yes?

The Court: Have you that?

The Witness: I have a graphical——

Mr. Thomson: Isn't that in the pleadings, Mr. Dyer?

Mr. Dyer: Yes, I have given him the weights. I brought that to his attention because I didn't want to mislead him.

Mr. Thomson: If it is in the pleadings I am not going to depart from what we agreed to in the pleadings.

The Witness: Yes, our record indicates that Boeing Stratoliner service was inaugurated by TWA in April 1945.

Mr. Dyer: Q. Isn't it also a fact that during the fiscal year of 1943-1944 there was rather heavy use of the runways at the San Francisco Airport

(Testimony of Harold Stanley Messersmith.)

by planes of United Air Lines that were flying the Trans-Pacific run for the Military?

A. What volume of traffic do you indicate as heavy use?

Q. Oh, flights of at least 14 landings and 14 take-offs a week.

A. It is conceivable that the volume of activity was conducted. No records were maintained because of the military nature of the operations at that time, so I couldn't tell positively. [203]

Q. You say that no records were maintained? To refresh your recollection, Mr. Messersmith, on the frequency and extent of use of the runways in 1943-1944, before the Stratoliners were put into use, I will ask you to read a portion of the 1943-1944 report of the San Francisco Public Utilities Commission. This portion appears on 198 and continues on page 199.

A. (Reading) "The Company began flying for the Army Air Transport Command between Army Air Depots in this country in the Spring of 1942, and had accumulated in excess of five and one-half million miles of transport operations at the close of June, 1944. This mileage is equivalent to 2,080 San Francisco to New York flights.

"It had also transported 21,000,000 pounds of cargo and 14,000 military passengers.

"Although the domestic operations for the Army Air Force will be terminated shortly, United Airlines continues to conduct Trans-Pacific Air Transport Command flights, and recently completed the

(Testimony of Harold Stanley Messersmith.)

one thousand three hundred fiftieth flight between San Francisco and the South Pacific theater of war. The records reveal that the company has flown more than 10,000,000 miles over the more than 7,350 mile route. Two daily round trips are now being flown with a fleet of Douglas C-54 4-engine transports of the U. S. [204] Army Air Transport Command in keeping pace with the increased tempo of South Pacific combat activities."

Q. Have you concluded with that, sir?

A. I want to elaborate on that, that although that indicates that these airplanes were flown, there were being maintained at the San Francisco Airport and they were operating in and out of the Airport with minimum gas loads and without any pay load. The flights with heavy loads actually were operated from Hamilton Field, as indicated in the next paragraph of that report.

Q. That does refer, however, to flights by 4-engine aircraft, does it not? A. Yes, it does.

Q. And——

The Court: Maybe we ought to read the following paragraph.

Mr. Dyer: Yes, sir.

A. I might add, also, that these operations were conducted on the facilities that were provided by the Federal Government. That is, the runway extensions that they had provided as partial payment for Treasure Island.

Now to read the following paragraph, it states:  
"The route which runs from San Francisco Air-

(Testimony of Harold Stanley Messersmith.)  
port to Hamilton Field, Honolulu, Canton Island, Tarawa, Guadalcanal and Port Moresby can be flown in approximately 50 hours. In this phase of the [205] Pacific operations, United Airlines has carried 20,000,000 pounds of men, materiel and mail. Passengers totalled 36,000, total weight of cargo was 6,000,000 pounds and air mail 5,700,000 pounds. In addition to its operations in the South Pacific, United Airlines has flown more than 4,500,000 miles, has transported 7,236,887 pounds of mail and express and carried 27,107 passengers for the Army Air Transport Command into the interior of Alaska."

Mr. Dyer: Q. Have you concluded, sir?

A. Yes, sir.

Q. That refers to flights only by United, does it not? A. Yes, it does.

Q. And it refers to flights by 4-engine aircraft?

A. Yes, it does.

Q. And they were all Trans-Pacific flights?

A. They were flights between San Francisco Airport, as indicated, and Hamilton Field.

Q. And points in the South Pacific, is that not right?

A. That is right, but the flights were between San Francisco Airport and Hamilton Field.

Q. Is this the type——. I show you this photograph. Will you please tell me what it purports to represent?

Mr. Thomson: Is this the same one, Mr. Dyer?

A. Trans World Airlines, C-54 airplane. [206]



(Testimony of Harold Stanley Messersmith.)

Q. Is that the type of airplane referred to in the paragraphs which you have just read to the Court? A. That is correct.

Q. And what is the weight of that aircraft?

A. The weight of that aircraft without—with minimum fuel and gasoline, operating in and out of the Airport, approximately 54,000 pounds standard gross weight.

Mr. Dyer: I will ask that this photograph be marked and received in evidence.

The Court: It may be admitted and filed in evidence.

The Clerk: Plaintiff's Exhibit 14 admitted in evidence and filed in evidence.

(Whereupon photograph referred to was received in evidence as Plaintiff's Exhibit No. 14.)

Mr. Dyer: Q. Mr. Messersmith, do you recall that in the year of 1943, from July of 1943 to July of 1944, the Airport had definite plans and in fact let the first contract for the construction of an 8,000 foot runway which would carry planes of 120,000 pounds weight?

A. I do not have any definite recollection of that. I believe that the Public Utilities Engineering Department could possibly confirm whether or not such a contract was let.

Q. Did I say 150,000 pounds, Mr. Messersmith? If I did, I wish to correct myself. I mean 120,000 pounds. A. I am not certain which you said.

Q. To refresh your recollection, I wonder if



(Testimony of Harold Stanley Messersmith.)

you would read this quoted paragraph of the report of the Public Utilities Commission for the fiscal year 1943-1944?

A. (Reading) "U. S. Army Air Force Construction:

"On March 29, the Federal Government, through the U. S. Engineers, awarded a contract to Macco Construction Company and Morrison-Knudsen for 2,500,000 cubic yards of fill and incidental work for the extension of the landing field. Orders have since been issued increasing the fill quantities to 3,089,000 cubic yards and 100,000 cubic yards of excavation. The total cost is estimated at about \$2,650,000.

"The main fill will extend 3,000 feet southeasterly from the southeast corner of the existing field, over the tidelands and will be 1,500 feet wide, adding about 100 acres to the usable landing field. Included in the program is the widening of the existing landing strip from 700 feet to 1,500 feet by placing fill on the adjacent mud area enclosing within the boundary levee. This contract is the first unit of a program which will include the reconstruction of the prevailing wind runway to carry planes of 120,000 pounds gross loaded weight, with a paved landing mat 7,000 feet long and a total [208] useable length of 8,000 feet, the reconstruction of taxiways, and the construction of 40,000 square yards of concrete parking apron designed for the new standard loading stress.

"The Army also constructed a temporary two-

(Testimony of Harold Stanley Messersmith.)

story frame building as an extension of the north end of the Administration Building, to provide additional office space, chiefly for the Weather Bureau."

The Court: 1943 and 1944?

Mr. Dyer: 1943 and 1944, yes, sir.

Mr. Dyer: Q. Now, that was before the time when the first Boeing Stratoliner of TWA went into service at the San Francisco Airport, was it not? A. That is correct.

Q. And approximately a year before that time the Airport had let a contract concerning the construction of a runway that would take planes of 120,000 pound weight, is that so?

A. That is correct. That contract was undertaken as a result of capital or finances made available by the United States Government as partial payment for Treasure Island Airport.

Q. Yes. And the planes that were contemplated to be taken by that runway, that is, planes of 120,000 pound weight, were in excess of the weights of the Boeing Stratoliners that thereafter came into service by TWA, is that not so? [209]

A. That is correct. The Army had contemplated use of the San Francisco Airport, that particular runways, for B-29 operations should the war situation in this area become critical. That was one of the justifications for building such a tremendously long runway in those days, the use by a B-29.

Q. You had a runway then in 1943 and 1944

(Testimony of Harold Stanley Messersmith.)

that would take not only the Boeing Stratoliner but also these very heavy Army planes that you have adverted to, is that correct?

A. Would you repeat that question, please?

(Question read by the reporter.)

Mr. Dyer: Q. I should say, contemplated runway.

A. Not a runway that would accommodate a repetition or any volume of landings by such heavy aircraft. They could not have been accommodated with the runways that existed in 1942-1943. To do so would not be a safe operation. They were not built to accommodate loads of—that is, repeated loads of more than 28,000 pounds of standard gross weight.

Q. Now, Mr. Messersmith, with reference to that statement I am going to ask you to read a paragraph from this report of 1943-1944 which appears on page 190. This is with reference to the use of the runways at that time by heavy military aircraft.

A. (Reading) “The operational activities of the military air forces remained static, but substantial increases were recorded in the operation of the heavier [210] and large types of military airplanes, particularly those operated under the jurisdiction of the Air Transport Command for domestic air evacuation purposes, Air Cargo Transport, and in the maintenance of 4-engined transports for Trans-Pacific service.”

Q. When did you first obtain information, Mr.

(Testimony of Harold Stanley Messersmith.)

Messersmith, that the Constellations were in use and contemplated?

A. I do not recall when we first obtained such information. I believe that it will be indicated in one of the reports of the Public Utilities Commission, which would indicate that same information. As I understand it, that data had been acquired on information from the Public Relations Departments of TWA and other airlines.

Q. Can you give me an estimate of when you first obtained such information?

A. I cannot recall. By reference to P. U. C. reports we could tell you definitely without guessing.

Q. Can you fix it within a period of five years? I don't wish to press you unduly, but I wonder if you could give us an estimate within that range?

A. Yes, sir, within five years. I would say 1943-1944.

Q. That is pretty accurate, Mr. Messersmith. I show you this picture which appears opposite page 191 of the 1943-1944 report, and what is purported to be shown thereon? This picture (indicating).

A. Yes, I see the picture. Well, this is a TWA Constellation taken before the airplane was licensed for commercial operations. That was in 1944 that it was supplied to the Airport. The latter part of 1944.

Mr. Dyer: If the Court please, I will offer this document entitled "San Francisco Public Utilities Commission, Fiscal Year 1943-1944" for identifica-



(Testimony of Harold Stanley Messersmith.)

tion. I will ask that those portions entitled "San Francisco Airport", which extends from page 189 to page 230, be received in evidence.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit 15 marked for identification. Plaintiff's Exhibit 16 admitted and filed in evidence.

(Whereupon document referred to above was marked Plaintiff's Exhibit No. 15 for identification only.)

(Whereupon portion of Exhibit 15 for identification entitled "San Francisco Airport" was marked Plaintiff's Exhibit No. 16 and filed into evidence.)

Mr. Dyer: Q. Now, that picture appears in the 1943-1944 report. Do you know how long before then the City received any information concerning that plane?

A. No, I do not know, although these reports are usually brought out about four months before the close of the fiscal year and the information is acquired from the airlines, and in this instance it was undoubtedly the latest information that TWA had, and it depicts the TWA airplane before it had been [212] licensed by the C.A.A. for air carrier operations.

Q. Had you had any discussion with any of the representatives of TWA before 1944 or 1943 concerning the existence of the Constellation?

A. Undoubtedly there was some during that time. If we received the picture at the end of 1944



(Testimony of Harold Stanley Messersmith.)

I would presume that we had heard about it before received that picture.

Q. Do you have any knowledge or information or recollection at this time of when that plane, the Lockheed Constellation was first test flown?

A. I do not have that information.

Q. In normal course of your business would you have known of the test flight at the time it occurred? Would that type of information generally come to you in your capacity as superintendent of operations?

A. It frequently would, but I couldn't recall the exact date.

Q. Would you say it is reasonable that in some fashion, then, before 1944 knowledge of the Constellation came to you?

Mr. Thomson: That calls for guesswork on the part of the witness. He has definitely testified he hasn't any knowledge.

The Court: Do you have any knowledge now?

A. I have no knowledge that TWA had ordered any of those airplanes or that that plane—that they planned to operate it from the San Francisco Airport at that time. [213]

Mr. Dyer: Q. Did you have any knowledge of the existence of that plane before it was test flown, while it was in the production stage?

A. I believe that I had some knowledge of it. I think that some of the first Constellations may possibly have gone to the Army or the Navy. But I cannot recall exactly when the knowledge first

(Testimony of Harold Stanley Messersmith.)

came to my attention, or information came to my attention.

Q. I don't think I should ask you for your exact knowledge, Mr. Messersmith, but do you have any recollection of that period? Was it 1942, 1943, 1941 or when?

A. There was a tremendous acceleration in the growth of aviation right about that time, and it was over a period of a few years, within 1942-1943.

Q. So that your testimony is that during the period of 1940 to 1943 it is not unlikely that you received information of the Constellation?

A. I do not recall receiving any information to the effect that Constellations would be operating from the Airport by TWA, and the facilities that we had at that time were inadequate to take care of the operation of a TWA Constellation. It would have been a hazardous operation to endeavor to operate them with the facilities we had at that time.

Q. As I recall, Mr. Messersmith, my question was your knowledge at that time during the period of 1940 to 1943 of the existence of the Constellation. [214]

A. I have endeavored to answer that to the best of my ability. I cannot pin it down to an exact date.

Q. But you did have knowledge during that period?

A. Sometime during that period I had knowledge that the Constellation was under development.

Q. And that knowledge was before it was test flown, is that correct?

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: I didn't understand, Mr. Dyer.

Mr. Dyer: Q. And that knowledge of the existence of the plane and its plannings, the production stage, was before the date it was test flown, is that correct?

A. I do not recall definitely whether it was before——

Mr. Thomson: Before it was what?

Mr. Dyer: Test flown.

A. ——or immediately at the time it was test flown.

Mr. Dyer: Q. Mr. Messersmith, to refresh our recollection on the date that the Constellation was first flown, I show you this document which purports to be a document issued by the Chief Research Engineer of Lockheed Aircraft Corporation, entitled, "Development of the Lockheed Constellation". Would you please——

Mr. Thomson: (Interposing) May it please the Court, I object to the use of that document in the manner here attempted. Virtually, it is an indirect attempt to introduce the document itself into evidence. He could ask the witness generally by [215] way of proper cross-examination whether that ever came to his attention, but to endeavor to read a document of this type is equivalent to its introduction in evidence, and the Courts I think quite consistently have held that that cannot be done. If we are going to have a battle now of pamphlets we are going to be here a couple of weeks.

Mr. Dyer: I have no such intention, Your Honor.

(Testimony of Harold Stanley Messersmith.)

I think the objection to the point that it was directed is well taken. I merely wish to direct to the attention of the witness the purported date on which it was flown.

The Court: You might ask him directly.

Mr. Dyer: Q. There is a reference in here to the first flight of the Constellation——

Mr. Thomson: Just a minute. I think that is beyond the realm—I suggest the only question that could properly be put to the witness is whether or not he has knowledge of a certain document.

The Court: Have you?

A. No, I have not. Much of the information regarding the new types of aircraft at that time was restricted information, and to the best of my recollection the publications that I had concerning the weight of the Lockheed Constellation did not come out until possibly in 1944. It was considered restricted data prior to that time.

Mr. Dyer: Q. Did you ever receive any information concerning [216] the weight of planes from an organization called The Institute of Aeronautic Sciences?

A. I do not recall receiving any information from the Institute of Aeronautic Sciences during the period in question.

Q. Now, Mr. Messersmith, as I recall your testimony this morning you stated that it was the steady or frequent use of runways that had the tendency to do the damage described by you. Isn't it a fact



(Testimony of Harold Stanley Messersmith.)

that TWA is not the most frequent user of the Airport?

A. That is a fact. TWA is one of the major users of the Airport. However, they are not the most frequent user of the Airport, and in trying to determine how much damage was sustained by the Airport as opposed to the tremendous reconstruction that we had to undertake to accomplish, or to make the field safe for the operation of the heavy aircraft, that reconstruction for the damage was a small proportion of the total cost that had to be expended to make the Airport safe for the operation of the heavy type of aircraft that TWA and others operate.

Q. I am referring now to your testimony concerning the frequency of use by various airlines. I have here a copy of Plaintiff's Exhibit 1. The answer and cross-complaint alleges that, with reference to the alleged damage by TWA planes, that Boeing Stratoliners were put in use in April of 1945. Now, as shown by this exhibit— [217]

The Court: Exhibit what?

Mr. Dyer: Plaintiff's Exhibit 1, sir.

The Court: What is Plaintiff's Exhibit 1?

Mr. Dyer: It is a statement of the number of TWA schedules per month for the period January 1, 1942, through December 31, 1952.

The Court: Proceed.

Mr. Dyer: Q. Now, as shown by this exhibit, Mr. Messersmith, how many DC-3 airplanes of



(Testimony of Harold Stanley Messersmith.)

TWA by schedule would utilize the Airport during the period April 1st, to May 1st, 1945?

A. Approximately 300 movements of DC-3 aircraft.

Q. Is that shown on this exhibit?

A. No. Why, yes, it is. It is shown as scheduled, but the movements or wear and tear on the Airport is not reflected by five schedules as indicated here. Those are—each one refers to two movements. Each schedule per day for 30 days, or five times sixty, 300 movements per month. Five times sixty.

Q. How many flights per day of DC-3s would that be?

A. The common denominator for use and wear and tear on the runway would be movements, and I would say this reflects 10 movements of DC-3s per day.

Q. To refresh our recollection, what is the weight of the DC-3 aircraft?

A. Approximately 25,000 pounds standard gross weight. [218]

Q. Yes. And that was a relatively light plane, was it not, in comparison with the other planes now used by scheduled airlines? A. Yes.

Q. And how many schedules are shown on here as being flown by Boeing planes from April to May of 1945? A. Did you say April or May?

Q. April to May, 1945. A. 60 movements.

Q. I see. That would be approximately one landing and one take-off a day, would it not?

A. That is correct.

(Testimony of Harold Stanley Messersmith.)

Q. Similarly there are two movements per day shown for May to September for that period of 1945, isn't that so? A. That is correct.

Q. So that during that period there are only two landings and two take-offs of a Boeing plane of TWA?

A. Well, I would like to point out that where the damage was sustained to a great extent was on the loading apron where the aircraft were parked for prolonged periods of time.

Q. We will get to that, Mr. Messersmith, but I would like to ask you to answer the question. I am referring to the landings or take-offs which are part of the issues raised here.

So that in that period adverted to by me and shown on this exhibit there are simply two landings and two take-offs of [219] TWA planes, isn't that correct—Boeing TWA planes?

A. Boeing 307.

Q. And the same is true for September to October, 1949, is it not? A. That is correct.

Q. And also for October, 1945 through May, 1946, isn't that correct? A. Correct.

Q. Now, isn't it true that that was a small percentage of the utilization of the runways during that period?

A. It probably represented approximately one-third of the movements of aircraft in this weight category.

Q. I see. What was the percentage of the total movement from the aircraft.

(Testimony of Harold Stanley Messersmith.)

A. I do not have those figures available right here. The aircraft that were within the weight limitations of the facilities couldn't—did not necessarily contribute to our requirements for reconstruction and replacement of facilities. Therefore, I have related it to the type of aircraft that exceeded the weight limitation of the facilities that we had at the time.

Q. Mr. Messersmith, I would like an answer to the question. Can you tell me what percentage of the total movements of the Airport are represented by the movements of Boeing planes during the period of April, 1945, to May, 1946. [220]

A. I would have to refer to our records, the Public Utilities Commission Annual Report, to determine that.

Q. Do you have any recollection of it at the present time, or any estimate of it?

A. The percentage of TWA movements to the total?

Q. Of Boeing movements to the total, TWA Boeing.

A. That is like comparing apples and grapefruit. Pardon me, but they are two different categories.

Q. Is your answer that you have no recollection of it at the present time?

A. By referring to the fiscal report of the Public Utilities we can answer that correctly. It is right in the reports.

Q. Mr. Messersmith, I am perfectly willing for

(Testimony of Harold Stanley Messersmith.)

you to check your report, but I am asking you for your estimate at this time. Do you have such an estimate in your mind?

A. A very small percentage of the total movements.

Q. Thank you. Now, there is an allegation in the answer and cross-complaint that in June, 1946, Constellations were put in service at the San Francisco Airport. As shown by Plaintiff's Exhibit 1, how many take-offs of Constellations took place that month when the Constellations were first put in service.

A. The record that you presented indicates approximately 30.

Q. And that would be one take-off of one plane and one landing of one plane, is that correct?

A. That is correct. 60 movements per month, two per day. [221]

Q. Similarly, the same is true of the next month, June to July, 1946.

Mr. Thomson: Well, if Your Honor please, I think this exhibit speaks for itself. He is simply asking the witness continually to read from the exhibit. I think the prolongation of the cross examination is needless.

Mr. Dyer: Your Honor, I think we are entitled to cross examine this witness and to show that due to the very infrequency of use of the runways it couldn't have been any substantial damage done by TWA planes. The testimony was that it was the



(Testimony of Harold Stanley Messersmith.)

use of runways by—frequent use of runways that contributed to the damage.

The Court: You suggested to my mind that the damage was done on the loadings.

A. I made mention of the fact that the apron in front of the Terminal Building was damaged by the heavier aircraft operated by TWA and one other airline. I only referred to that one specific piece of paving because no other aircraft operated on it, and there we could demonstrate the effect that would occur throughout the entire airport.

In other words, this is just a small segment of the field, or of the loading apron. Then we could point to it and say the airlines utilized that exclusively. No one else used it, Your Honor. Then we apply the same thing to our entire facilities that were constructed and accommodate the same load, and we [222] could assume or expect that the same thing would occur throughout the Airport by having these excessive weights use the Airport.

Therefore, we initiated action to improve the total Airport so that they could operate in safety.

The Court: Proceed.

Mr. Dyer: Q. Now, Mr. Messersmith, with reference to that statement, the Public Utilities Report of the City show you had contemplated runways capable of taking planes of 120,000 pound take-off weight, isn't that so?

Mr. Thomson: I believe in this instance counsel should fix the date.



(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Q. I believe it appears in the 1943-1944 report which is in evidence.

A. That was indicated in there as being our objective.

Q. Yes. Now, isn't it a fact that pavement on the runways is entirely different than the pavement on the ramps?

A. I would recommend that, for comparison for the type of pavement, that that matter be referred to the Public Utilities Engineering Bureau.

Q. I am asking you?

A. They have—. There is a different type of pavement, but the load bearing ability of the pavement is about equal or is equal.

Q. It is equal? Then would you say that the ramps are [223] capable of taking planes of 120,000 pounds?

A. Not at this time, no. No, they were not at this time. But on the ramps you had more of a concentrated load. There where the airplanes were parked for a prolonged period you had repetition of strain and stress in that particular area, whereas on the runways they would not necessarily land at the same point all the time.

One time they would land here, another time at a different point. So that you could not have the greater repetition of strain and stress on your runways and taxiways than you could have on your focal points such as loading ramps, unless with the matter of time and with increased activity it would also occur on your runways and taxiways. [224]

(Testimony of Harold Stanley Messersmith.)

Q. Do you recall, Mr. Messersmith, that during the war the ramp areas were used to a great extent by heavy military planes of the C-54 type?

A. The ramp area in front of Hangars 1, 2 and 3 and south—well, 1, 2, 3 Combat, which were constructed in the same manner as TWA's apron and the ramp in front of the Terminal Building, were used by P-39's and P-38 airplanes almost exclusively. Those were not really a heavy type of aircraft such as the Stratoliner or the Lockheed Constellation.

Q. Isn't it a fact that the areas used by the military planes and the ramp areas broke up during that period?

A. The particular apron area, except in front of the Terminal Building and in front of TWA's hangar did not break up during that period. As a matter of fact it wasn't replaced until two years ago, and then it was damaged by the introduction of DC-4's, Lockheed Constellations, DC-6's, and those aircraft operated by the airlines.

That apron there actually did hold up until two years ago. It was the same type of construction as in front of the Terminal Building where we had the accelerated deterioration because of heavy loads.

Q. And you have no recollection at this time of those areas breaking up because of the heavy use by C-54 planes bringing in litter cases?

A. They did not use the area in front of Hangars 1, 2 and 3, [225] which were similar to hangars of—

(Testimony of Harold Stanley Messersmith.)

Q. (interposing) Don't you recall discussing that matter with Mr. Moran of TWA, the breaking up of the area by the C-54's?

A. Yes. That area involved was the area that was utilized by TWA and by Western Airlines in front of their own hangars on property that was in their exclusive use.

Q. What do you mean by exclusive use? Isn't it a fact that under the lease and according to your recollection those areas could also be used for access to No. 4 and the field by other planes?

A. No. For a matter of several years, or since the termination of the war, the property involved has been rented for the exclusive use of a specific air carrier or a specific tenant.

Q. Well, now, isn't it a fact, Mr. Messersmith, that the other airlines at the Airport had the right to use the ramp in front of Hangar No. 4 as a taxi-way?

A. In the lease agreement it is stipulated that TWA would have the ingress and egress of that particular apron to their hangar, and if anyone else had used it they would have blocked the ingress and egress to TWA's hangar. I don't believe TWA would agree to that.

Q. Well, do you recall this provision in the lease?

Page 2, paragraph 1—referring to the right of parking [226] aircraft on the ramp of that hangar?

"Such right, however, not to be exercised so as

(Testimony of Harold Stanley Messersmith.)

to interfere with the public use of said ramp as a taxi-way?"

A. That is correct. But they did not park aircraft there, and it is at the locations where TWA parked their aircraft to service them outside the hangar, and the ingress and egress area, that we had to replace the paving on more than one occasion, and is where the deterioration set in. Subsequently the entire apron, because of the use of heavy aircraft and the introduction of heavy aircraft, had to be completely reconstructed.

Q. Mr. Messersmith, all these areas that were improved and reconstructed, and so forth, as alleged in the answer and cross-complaint, were so improved and reconstructed and enlarged from funds obtained from the bond issue of 1945, isn't that correct?

A. That is our general obligation fund, yes. Not all of them, no, sir. I would like to correct that. Some of the work was accomplished with 1938 bond fund appropriations and the 1945 as well.

Q. Well, I will accept that, of course.

Isn't it a fact that within the purview of your answer all the funds to enlarge and reconstruct these runways and taxi-ways and ramps, and so forth, came from some bond issue? [227]

A. No, at one time or on a few occasions the Board of Supervisors appropriated reconstruction and replacement funds to take care of required reconstruction and replacement. I believe they appropriated in excess of one hundred thousand dol-



(Testimony of Harold Stanley Messersmith.)

lars so that we could keep our storm wind and 18-36 runway in service for a period of approximately eight months over a winter so that the air carriers could utilize or continue operations while we had adverse weather conditions. That was a temporary repair merely so that the airlines could continue operation over the winter period, because at the same time we had under construction a new runway that would be placed in service approximately one year after that date, and prior to the next winter.

Q. Isn't it a fact that the major portion of these funds were obtained from the '45 bond issue?

A. Yes, a major proportion of the 18 to 20 million dollars used to enlarge, reconstruct and strengthen the general or common use facilities of the Airport came out of bond funds.

Q. Those bond funds were sponsored by the Public Service Commission, were they not, among other civic bodies?

A. Yes, to my understanding they were.

Q. And isn't it a fact that the public was advised by the Utilities Commission and other civic-minded bodies and officials that these improvements were necessary because of civic betterment considerations? [228]

A. Well, there were many logical reasons presented to the public in order to obtain their support while they continued development of the San Francisco Airport.

Q. And among those reasons was not the public



(Testimony of Harold Stanley Messersmith.)

advised that these funds were necessary in order that San Francisco obtain a major airport?

A. Yes; at that time, as I recall, we gave the public assurance that with the expenditure of the 1945 and 1949 bond funds we would strive to make the Airport financially self-sustaining. That is one of the goals that was set and which we indicated to the public would be accomplished if they approved it—approved the issues.

The Court: Q. What is the situation now? Is it self-sustaining?

A. In 1952, the deficit was \$696,000, approximately, Your Honor. That does not include the redemption of any general obligation bonds, but it does provide for maintenance and operation of the Airport, administration and for depreciation on the facilities.

Q. Why aren't the bonds included?

A. The bonds are being redeemed, as I understand it, as rapidly as possible, and they were general obligation bonds at the time.

Q. Well, I don't know so much about these financial matters. Why isn't that part of the deficit?

A. Well, it could conceivably, let us say, be treated as part of the annual deficit. After all that amount of money—let us say the—I cannot tell you exactly what the amortization of the bonds is, but it is approximately two million dollars per year, and if we added that to our total deficit, it would be close to—in excess of two million dollars a year, if we added the redemption of the bonds.

(Testimony of Harold Stanley Messersmith.)

The Court: There is some Scotch in me. That is the reason I wanted to know about this.

Mr. Dyer: Q. Without going into an excursion on that subject, Mr. Messersmith, isn't it a fact that in the year 1951-52 the revenues received by the airport exceeded expenses, exclusive of bond redemption and interest?

The Court: Exclusive of bond redemption?

Mr. Dyer: Yes.

A. Excluding bond redemption, interest or anything for reconstruction and replacement, which could be termed as depreciation. It was sufficient to take care of the current maintenance and operation, but not all of the other cost factors involved.

Mr. Dyer: Q. I have here, Mr. Messersmith, the 1951-1952 Annual Report of the Commission. I wonder if you would read this paragraph with reference to the financial situation at that time.

A. "For the year, exclusive of—" [230]

The Court: What year? Pardon me?

The Witness: This is the Annual Report of the fiscal year 1951-1952 of the Public Utilities Commission. It states:

"For the year, exclusive of bond interest and bond redemption, actual expenditures totaled \$737,-251.31, as compared with actual revenues of \$993,-259.90."

I would like to mention there that that was very carefully worded to state "for the year, exclusive of bond interest and bond redemption," which as

(Testimony of Harold Stanley Messersmith.)

an item in excess of two million dollars, and it does not include any depreciation provisions.

I might add that we make that report out in that manner because frequently the status of one airport is compared with other airports throughout the country who do not necessarily indicate the depreciation or the bond redemption; and if we don't put it in the same category as other airports, it appears as though we are doing a poorer job than some of the other communities.

The Court: You might add to that the dear taxpayers who pay the jingle on these matters do not know about it either, do they?

The Witness: Well, the Controller of the City and County of San Francisco frequently——

The Court: Who is that?

The Witness: That is Mr. Ross—frequently brings to [231] our attention the fact that the expenditures are that.

Mr. Dyer: Q. Mr. Messersmith, were you responsible for this statement in the '51-52 report: it refers to the fact that the Airport is responsible for 75 million new dollars coming into the economic channels of the community each year.

Mr. Thomson: I think that is quite immaterial, Your Honor.

The Court: That is a good sales talk.

Mr. Thomson: I probably should not have objected to it. Withdraw the objection.

Mr. Loring: Do you stipulate to the accuracy of that remark?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Do you stipulate to the accuracy of that remark, Mr. Thomson?

Mr. Thomson: I will stipulate the Airport is a very fine thing for San Francisco.

Mr. Dyer: Q. Now, Mr. Messersmith, as I recall your testimony, you stated that the major portion of these funds for the improvement of the Airport come from the 1945 bond issue. How long before that bond issue were those improvements planned?

A. Oh, I believe earlier today I told you I would estimate three years.

Q. Three years. So you would say that in 1942 the improvements which now exist at the Airport because of the expenditure of those funds were planned, is that so, or were in the planning [232] stage?

A. I never heard of any contemplated 20 million dollar expenditure for the improvement of the Airport until some time in 1944.

Q. But did you discuss—

A. The plans—pardon me,—and any plans prior to that time were very vague and we had no real basis upon which to proceed, but approximately the end of 1944 the trend in aviation, I believe, began to crystallize.

Q. So that you did have some definite plans for the construction of these facilities and improvements in 1944?

A. Approximately the end of '44.

Q. Isn't it a fact that you had those plans before



(Testimony of Harold Stanley Messersmith.)

the first Boeing Stratoliner was put into use in April 1945?

A. It is possible that we had some plans along that line before that time. We have continually strived and stressed the development of facilities that will provide for the safe operation of aircraft at the San Francisco Airport.

Q. Similarly, isn't it true that you had definite plans for the improvement of those facilities and the extension of those facilities before the Constellations were put in use?

A. The definite plans were a matter that was referred to in Mr. Jens letter; subsequent to the approval by the electorate of the 1945 bond issue, our plans were submitted to the air carriers for review in 1946. At that time TWA recommended [233] that the distance between the runways be increased to 1500 feet instead of the 700 feet contemplated. That is the time that the crystallization of the plans for the development took place. It is obvious that the airlines would have to be a part of such planning, because they are the principal customers of the Airport.

Q. And that plan was known in 1944 before the Boeing came into use and before the Constellations came into use, isn't that so?

A. In a preliminary manner, yes, but not conclusive.

Q. Didn't you have definite plans at least as early as December 1st, 1944 for the construction of those facilities before the Boeings came into use?



(Testimony of Harold Stanley Messersmith.)

A. It is possible that we were working on preliminary plans at that time.

Q. To refresh your recollection, do you recall that on December 1st, 1944 there was an extensive meeting at the Airport attended by the Mayor, Mayor Lapham, and Mr. Cahill, Manager of Utilities, and eight Supervisors, and at that time extensive public statements were made orally concerning the facilities to be constructed at the Airport?

A. I wouldn't remember the exact date. I don't recall that on that specific date, but if it occurred, well——

Q. Pardon me. Would you continue? Had you finished?

A. If you have evidence that that occurred, well, I state [234] that we were making plans in a preliminary manner at that time.

Q. And there were public statements made at that time, is that not so, sir, concerning the expansion of those facilities?

A. Well, I do not recall.

The Court: Did they call you into the meeting, do you recall?

The Witness: Yes, I attended the meeting if it is—I attended one meeting at approximately that date concerning—whether it would be six months or a year later I could not tell.

Mr. Dyer: Q. And that was before the Boeing Stratoliners were put into use, isn't that so?

A. Yes. Well, I have already testified and there

(Testimony of Harold Stanley Messersmith.)

is evidence that the Boeing Stratoliners were put in limited service prior to that time. I don't believe TWA ever acquired more than four of those Stratoliners.

Q. Isn't it a fact that Boeing Stratoliners by TWA did not come into operation until April 1945?

A. At our Airport. I am talking about Boeing Stratoliners in general.

Q. My question is concerned with Boeing Stratoliner utilization in San Francisco. This meeting of which you have some recollection and these preliminary plans, at least, were in existence before the Boeing utilization of San Francisco, is that not so?

A. Yes.

The Court: It is now time for adjournment. I see you are having some difficulty in knowing what direction you are going in. We will take an adjournment.

Mr. Dyer: I am just about to land, Your Honor.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m., Thursday, September 10, 1953.) [235-A]

The Clerk: Trans World Airlines, Incorporated versus City and County of San Francisco, further trial.

Harold Messersmith to the stand, heretofore sworn.

HAROLD STANLEY MESSERSMITH

resumed the stand on behalf of the defendants and cross-plaintiffs, having been previously sworn, testified further as follows:

Cross Examination—(Continued)

Mr. Dyer: Q. Mr. Messersmith, I wish to make clear a matter that was adverted to yesterday. Is it a fact that at the present time United Airlines is operating in the San Francisco Airport and is utilizing both space and facilities under a lease agreement? A. Yes.

Q. And they pay for both space and facilities under that lease agreement; is that correct?

A. Yes.

Q. And I am referring specifically to common use facilities as well as space? A. Yes.

Q. And the term of that lease is for 40 years?

A. That is correct. [236]

Q. And the amount provided by that lease for payment by the United is less than the present schedule of rates and charges?

A. Yes, it is.

Mr. Thomson: For the sake of clarity, Mr. Dyer, you mean that by 40 years the period created by the lease itself; it hasn't 40 years more to run?

Mr. Dyer: That is correct, Mr. Thomson. I was referring to the lease term as stated in the lease.

Mr. Thomson: Yes.

Mr. Dyer: I will enter into the stipulation that it was entered into, I believe, in 1947, if you will accept that. ■

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: I believe that is the correct data offhand. I will stipulate subject to any necessary correct.

Mr. Dyer: Q. Mr. Messersmith, at the close yesterday we were discussing the time when the City had contemplated and planned the expansion and the improvement of the facilities of the San Francisco Airport. Do you recall a letter that was written on December 11, 1944 to the Board of Supervisors of the City and County of San Francisco and signed by Mr. Cahill, Manager of Utilities, Mr. Doolin, Manager of the Airport Department, and by the President and members of the Public Utilities Commission?

A. May I see the letter?

Q. Yes, of course. This is a print of that letter, sir, contained in the official report of the Public Utilities [237] Commission for the fiscal year 1944 and 1945. It commences on the page which I am indicating.

A. Yes, I recall this.

Q. And that was a definite recommendation to the Board of Supervisors by the Public Utilities Commission on December 11, 1944, that the facilities and improvements at the Airport be constructed with the proposed \$20,000,000 to be derived from a bond issue; is that not correct?

A. That is correct.

Q. And the date of that letter was December 11, 1944, was it not?

A. That is correct.

Q. And that was before the Boeing Stratoliners

(Testimony of Harold Stanley Messersmith.)

and been in service at San Francisco, is that not correct?

A. That is correct; we were preparing for them.

Q. And also before the Constellations were put in service at San Francisco?

A. Yes, it was. The capital expenditure was requested in order to be able to accommodate the heavy type of aircraft that the scheduled air carriers planned to operate.

Q. You had in contemplation those heavy aircraft about that time, is that correct?

A. Yes, we did.

Mr. Dyer: I will ask that this document be marked for identification, sir, and I will ask leave of Court that that [238] portion of this report entitled "San Francisco Airport Department," which extends from page 183 of that report to page 238 be received in evidence.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 17 marked for identification; Plaintiff's Exhibit 18 admitted and filed in evidence.

(Thereupon the report referred to above was marked Plaintiff's Exhibit 17 for identification only.)

(Thereupon chapter of report entitled "San Francisco Airport Department," was marked Plaintiff's Exhibit 18 and admitted into evidence.)

Mr. Dyer: Q. Mr. Messersmith, as I understand one of the assertions of the City, it is that



(Testimony of Harold Stanley Messersmith.)

the City and County of San Francisco to some extent exercises a police power at the Airport. Isn't it a fact that the Airport is policed by members of the Sheriff's Department of the County of San Mateo?

A. The San Francisco Airport is located in the unincorporated portion of San Mateo County. The police functions that are carried out by the employees of the Airport are the enforcement of rules and regulations and the proper control of the public. We have to control traffic. We have to see that vehicles and other people are restricted from going on the flying field or common use facilities of the Airport. That protection is necessary at the Airport in order for the scheduled airlines and others to operate safely and efficiently. The Sheriff's [239] Office does not assume that responsibility at the San Francisco Airport.

The Court: May I inquire the purpose of this testimony?

Mr. Dyer: Yes, sir. One of the claims of the City, if the Court please, is that in the operation of this Airport that police power is exerted. We wish to show that in some of the phases of the operation of the Airport which would obviously involve the exercise of police power, that that simply is not the fact.

Mr. Thomson: If Your Honor please, if the term "police power" happens to be in my pleadings—I'm not sure as to whether or not that term is incorporated, but if that is true, I used the term

(Testimony of Harold Stanley Messersmith.)

“police power” in the general sense, not that it indicated exercise of authority by a police officer; but I find the law to be that the rate fixing power is part of the police power. If the term “police power” appears in the pleadings, I used the term “police power” in that sense.

I think Your Honor’s curiosity as to the purpose of this particular testimony is well taken.

Mr. Dyer: We are not concerned with people in uniform down at the Airport keeping the public in line.

The Court: I am unable at this time to fully appreciate the significance of this testimony.

Mr. Dyer: Well, sir, police power, as we understand it, is a power which is exercised for the protection of public [240] health, safety and morals, as I understand it, sir. And one of the points that I believe can be made in this case is that since the Airport is located wholly without the municipal boundaries of San Francisco and wholly without the reach of the Governmental powers of that party, that any claim that police power extends thereto is not a valid claim, and in support thereof I think we should bring to the attention of the Court the fact that in the exercise of obvious police power, let alone some which might be in question such as the regulatory power here, that the police power of the City and County of San Francisco was not exerted at that location.

The Court: Where is the pleading that brings that into question?

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: I think it is implicit, sir, in the issues presented to the Court. The pleadings do not verbatim say that police power is exerted there, but I think that that is a matter that the Court ultimately must consider.

Mr. Thomson: Haven't you proved enough, counsel, when you prove that the Airport is located in the County of San Mateo? Isn't that sufficient for your purposes in raising any appropriate legal question?

Mr. Dyer: I do not think so. I think in addition we should bring to the attention of the Court the fact that the Airport is not policed and the police power is not exerted at that location. [241]

Mr. Thomson: We will stipulate that that power ceases outside the boundaries of our city.

Mr. Dyer: Will you further stipulate that Deputy Sheriffs of the County of San Mateo and not police officers of the City and County of San Francisco do any policing necessary?

Mr. Thomson: That is true; they are deputies appointed by the County of San Mateo because it is within its territorial jurisdiction. I will so stipulate.

Mr. Dyer: With that, I will not pursue——

Mr. Thomson: I believe, however, I will add that those security officers are in part paid by the City and County of San Francisco. They are carried upon the payroll of the City and County of San Francisco in whole or in part, Mr. Messersmith?

A. They are paid in whole by the City and

(Testimony of Harold Stanley Messersmith.)

County of San Francisco. They are there to protect the life and property of those using the facilities of the Airport, and they perform duties that the Sheriff of San Mateo County does not consider his responsibility.

Mr. Dyer: I will move to strike that latter statement as a volunteer statement and as not responsive.

Mr. Thomson: That may go out.

The Court: It may go out.

Mr. Dyer: I will accept the stipulation and not pursue this matter further, sir. [242]

The Court: Very well.

Mr. Dyer: Q. Mr. Messersmith, with reference to your testimony of yesterday concerning your journey on the TWA coach flight to Chicago——

Mr. Thomson: Kansas City.

Mr. Dyer: Q. Kansas City; I beg your pardon, —do you have any personal knowledge of the total fares paid by the passengers in that plane at that time?

The Court: It is limited to your knowledge.

A. Only on the basis that I indicated yesterday, and that the fact that the first stop of the flight was Kansas City, so that none of the passengers could have paid less than the amount I said, approximately \$70 per passenger, and many of them who did not get off at Kansas City and went on had paid considerably more, because the next stop was several hundred miles further along the route.

Mr. Dyer: Q. Had you seen the flight manifest?

A. No, I did not see the flight manifest, but I



(Testimony of Harold Stanley Messersmith.)

am aware that the C.A.B. does not permit the air carriers to allow people to ride on those revenue flights free.

Q. Have you ever investigated the records of TWA to determine precisely how much money was paid by all those passengers for that flight?

A. No, sir, I did not, but I have investigated the records of all of the air carriers as issued by the Civil Aeronautics [243] Board, and we find that, predicated on the average load factor, that the airlines' total revenue from passenger service at San Francisco Airport, dealing——

Mr. Dyer: Just a moment, if the Court please; I submit that his answer thus far is not responsive and is volunteered. I simply asked if he had investigated the records of this one airline as to the revenue received from that particular flight. I don't believe that that calls for a general statement as to the overall revenues of all airlines.

Mr. Thomson: I don't think you can tell whether he is answering the question until he completes his answer.

Mr. Dyer: I think you can tell at this time.

The Court: I will merely have the reporter read the question and the answer as far as given.

(The reporter read as directed.)

The Witness: (Continuing) In passenger service only, because it is nearly \$250,000 per day.

Mr. Dyer: I move that all of that answer with the exception of the word "no" go out, sir, as not responsive.



(Testimony of Harold Stanley Messersmith.)

The Court: The objection will be overruled. The question and answer may stand.

Mr. Dyer: Q. Do you have any information of your own knowledge concerning the amount of express that was loaded on that plane?

A. I do not have any personal knowledge of that fact. [244] However, I answered it by stating approximately or in excess of the amount, because I purposely made the figure very low so that it would be less than you would normally realize from a full revenue load.

Q. You did not see the number of express shipments that were loaded on that plane, did you, Mr. Messersmith?

The Court: The answer is he doesn't know.

Mr. Dyer: He doesn't know. All right, sir.

Mr. Dyer: Q. I think that you also referred to the amount of mail carried on that flight?

A. I did not refer to the amount of mail; I referred to the fact that mail was carried.

Q. Mail was carried. Do you have any knowledge, of your own knowledge, how much mail was carried? A. No, I do not have.

Q. Do you have any knowledge of the expenses of TWA that were allocated to that flight, overall expenses, of your own knowledge?

A. No, but I have seen reports issued by TWA as to their financial status and as to the amount of profit that they are making.

Q. That is overall, but my question was an allo-

(Testimony of Harold Stanley Messersmith.)  
cation of expenses to that particular flight, such as out-of-pocket expenses.

A. The answer to that is no. However, we do know that the [244] revenue load factor or the revenue derived per flight out of San Francisco Airport is far higher than the average revenue that TWA realizes from other Airports on its route. In many instances it is hundreds of per cent higher.

Mr. Dyer: I move to strike that entire answer with the exception of the first word "no".

The Court: It may go out.

Mr. Dyer: Q. Mr. Messersmith, as I understood your testimony on that point, it was that TWA, on the basis of your assumptions and your derived figure, obtained a certain amount of revenue from one of several customers of the Airport; that is correct, is it not? A. That is correct.

Q. Do you relieve that a rate of any Utility should be based upon the amount of revenue that a customer of that Utility might obtain from the utilization of the service?

A. No, I do not believe that that is necessarily the barometer upon which they should pay. Our schedule of rates and charges now in effect are not predicated on that basis unless an air carrier by preference requests that they be placed on that basis. Now we have what is called an alternative schedule. That has been chosen by request by one air carrier. In that instance the carrier accepted the application of a 3.2 per cent penetration into its gross receipts for passenger revenue at the San

(Testimony of Harold Stanley Messersmith.)

San Francisco Airport. That was not mandatory [245] in our rate and charge schedule but provided an alternate by which short haul carriers who have a repetition of landings at close intervals may accept that method of payment. I might add that on that basis they are paying more today than the schedule of rates and charges provides for.

Q. Mr. Messersmith, let me put it to you this way: A customer of the Telephone Company utilizes certain telephone services, and because he is able to place certain telephone calls he obtains certain profits. Do you believe that the charges of the Telephone Company to that man for the use of that service should be based upon the profit that that man makes?

A. No, and in our rate and charge structure we have not pursued that method. We have pursued the method of trying to determine or determining the cost of perpetuating the Airport and by perpetuating certain segments of the Airport and then dividing the cost among the users. In the case of the scheduled air carriers the rate and charge structure now in existence is predicated on the utilization of our common use facilities to 80 per cent of its potential. In actual effect we are down around 30 to 40 per cent, so that even if we derive all of the revenue on the schedule—on the basis of our present schedule of rates and charges, we will only realize less than half of the revenue necessary to perpetuate the common use facilities based on today's volume of traffic.

(Testimony of Harold Stanley Messersmith.)

Q. Mr. Messersmith, I take then that your answer is that you [246] don't believe the charges to a customer should be based upon the profit or revenue that a customer may receive through a partial utilization of the service provided, is that correct?

A. No. But that may point out the reason that we have mentioned these proportions,—that is the payment by TWA as opposed to the revenue,—is that Mr. Thompson in his testimony indicated that this was going to do great economic harm or damage to TWA; and relatively the charges are insignificant as compared with the total revenue.

Mr. Dyer: I will move that that latter statement go out as irrelevant and the opinion and conclusion of the witness.

The Court: The question and answer may stand. The objection will be overruled.

Mr. Dyer: Q. Mr. Messersmith, I wish to discuss with you briefly the letter that was received in evidence at the instance of the City and is marked Defendants' Exhibit E. It is a letter to Mr. B. M. Doolin, dated May 17, 1946, and signed by A. M. Jens, Jr., of TWA. Mr. Jens at that time was a member of the Air Transport Association of America, was he not, sir?

A. I never heard that he was secretary of the Air Transport Association. This is signed J. M. Jens, Jr., Secretary, Transcontinental and Western Air.

Q. That is right; but I have some question



(Testimony of Harold Stanley Messersmith.)

whether that is responsive. Isn't it a fact at that time he was a member of the Air Transport Association? [247] A. I would not know.

Q. Would you read the second paragraph of that letter to refresh your recollection?

A. (Reading) "The investment necessary to provide a second runway system is considerable and, unless full value can be achieved from the use of the field, does not seem to be justified. After considerable investigation the Air Transport Association of America has decided upon a recommended spacing for such runways of 1,500 feet from centerline to centerline in order to permit simultaneous operations under other conditions than contact. We subscribe to this recommendation and believe that anything less will not achieve fully the desired objective."

Q. Isn't it a fact, Mr. Messersmith, that he was there speaking of a recommendation of Air Transport Association of America?

A. It would appear to me, if you are asking that question, that it was both the Air Transport Association and TWA's recommendation. TWA is a member of the Air Transportation and participates in the existence of that group.

Q. He is speaking here specifically, however, of the recommendation of the Association; isn't that so?

A. I would anticipate that if it was from the Airport [248] Transport Association, it would have been on their stationery and not on TWA station-



(Testimony of Harold Stanley Messersmith.)

ery. We have other correspondence from the Air Transport Association that does not come on air carrier stationery.

Q. Well, I don't wish to prolong this unduly, Mr. Messersmith, but isn't it a fact that the letter speaks of the recommendation of the Air Transport Association?

The Court: The letter will have to speak for itself in any event.

Mr. Dyer: Very well, sir.

Mr. Dyer: Q. Isn't it a fact that from time to time the Airport has asked the advice of various airline and Airport Associations such as the Air Transport Association?

A. It is a fact that we confer with representatives of the scheduled air carriers regularly using our facilities from time to time in the planning of our Airport development.

Q. And you ask them for advice and recommendations; is that correct?

A. Yes, we do ask them for advice, recommendations and various data.

Mr. Dyer: That is all for Mr. Messersmith on cross examination. [249]

### Redirect Examination

Mr. Thomson: Q. Mr. Messersmith, in the calculation of the revenue from this flight from San Francisco to Kansas City, which is becoming quite famous, did you calculate in the figure which you furnished to his Honor any revenue from mail?

(Testimony of Harold Stanley Messersmith.)

A. I made my statement at that time that that would be the approximate passenger revenue, and in addition that they would derive revenue, I believe, from airmail and other cargo.

Q. Your figure, however, did not comprehend revenue from mail, am I correct?

A. It did not.

Q. Likewise, is the same thing true of the revenue which might have been derived from express? Was that calculated in your figure?

A. It was not.

Q. Does the Railway Express business of the Airport—Rather, does the express business being operated at the Airport embody any operation of aircraft by the express company?

A. No, it does not.

Q. Just what is the activity of the express company in that connection?

A. They primarily serve the scheduled airlines, at the Airport. They use—they collect and disseminate express. That is, they collect express that is being shipped by these various schedule air carriers, and when express is brought to [250] the Airport by the air carriers they distribute that express.

Q. Are you familiar with the figures embodied in the document of October 1942, with respect to common use facilities to be used by TWA?

A. Yes, I am.

Q. Have you compared those figures with the rates and charges then in effect?

A. Yes, I have made a comparison of the sched-

(Testimony of Harold Stanley Messersmith.)

ule of rates and charges then in effect with those included in the 1942 leasing agreement with TWA.

Q. What is the result of your comparison?

Mr. Dyer: I will object to that as incompetent, irrelevant and immaterial; it isn't the best evidence. The lease is either valid or isn't, your Honor, and I don't see how inquiry of this nature could aid the Court in determining that question.

Mr. Thomson: It is my purpose to establish that the figures set forth in the October 1942 document are in precise accord with the rates and charges then in effect, and from that this Court could reasonably draw a conclusion to the proper construction of the document so that those rates and charges apply, subject to further revision of rates and charges. That is the purpose of this testimony, your Honor.

Mr. Dyer: Your Honor, if the lease is a valid document and that was the bargain of the City at the time, then I [251] believe that we are obligated to pay those rates and charges or those rentals and no others.

On the other hand, if the Court decides that the position of the City is correct, then we pay such level of rates and charges as may be determined by the Public Utilities Commission of the City.

Those are questions of ultimate fact, and I believe that any evidence of the details underlying those facts by which the City may arrive at some level of rates and charges to be determined by the Public Utilities Commission of the City in the event

(Testimony of Harold Stanley Messersmith.)

of a decision adverse to the plaintiff's position is not pertinent evidence.

The Court: It may or may not become material. I will allow it subject to your motion to strike and over your objection.

Mr. Thomson: Q. What is your conclusion after making that comparison, Mr. Messersmith?

A. The schedule of rates and charges concerning common use facilities or landing charges is the same in the schedule of rates and charges adopted by the Commission and the lease agreement.

Q. In other words, there is complete accord in those figures? A. Yes, there is.

Q. There has been mentioned in the testimony throughout taxi-ways and runways and aprons and paved areas. Will you, [252] for the information of the Court give an estimate as of today as to the length and extent of those paved areas, inclusive of the runways and aprons?

A. Well, the total paved area that is considered common use facility would be equivalent to approximately 60 miles of four-lane highway such as the Bayshore Freeway. That is, the equivalent amount of paving as to common use facilities.

Q. Well, you say "equivalent amount of paving". Do you mean from the standpoint of distance?

A. Well, you could compare the runways, taxi-ways and apron areas that are used for common use purposes by scheduled airline carriers and others to a four-lane highway 60 miles in length.

Q. That is all on the airport, though?



(Testimony of Harold Stanley Messersmith.)

A. Yes, that is all on what we call the common use facilities.

Q. I have here Plaintiff's Exhibit 1, which sets forth various operations of the airport by TWA under the category of various planes, and noting the runways item, November of 1952 to December 31st, 1952, there appears from this exhibit that there is one DC-4, one DC-3 and seven Constellations. As of today is that about representative of the proportion between those different types of planes?

A. It is approximately representative. I believe that the number of Constellations flights have increased.

Q. Do the Constellations operated as of today by TWA vary [253] as to weight?

A. Well, as I recall the initial Constellation plane put in service by TWA in approximately 1947 weighed 77,800 pounds. I believe the present Constellation's maximum gross weight has come up as high as 120,000 pounds.

Q. Is there more than a 120,000 pound Constellation in operation today by TWA?

A. Yes. That is the maximum weight of the aircraft that I know they are operating today. However, I understand that they contemplate the operation of a larger Lockheed Constellation.

Q. Have you heard about that new design in Constellation?



(Testimony of Harold Stanley Messersmith.)

A. Well, I believe it is a Lockheed 1049-C, and will have a maximum weight of 130,000 pounds.

Mr. Thomson: Inasmuch as I might require Mr. Messersmith to testify on this subject, may I again present to you what I discussed with you when his Honor came on the bench?

Mr. Dyer: Yes.

Mr. Thomson: I would appreciate a stipulation that the property referred to in this letter is the same area that was involved in your questions to Mr. Messersmith yesterday. I can prove it, but there is no need of encumbering the record unnecessarily.

Mr. Dyer: I will stipulate that that is the area in front of Hangar No. 4, which was adverted to by me yesterday. [254]

Mr. Thomson: Yes. And you made particular reference to the right of ingress and egress, and also the right of others, other aircraft companies, to traverse the area.

Mr. Dyer: I think that in discussing that area that was the purport of the questions.

Mr. Thomson: I can offer this in evidence or read it into the record, whichever your Honor prefers.

The Court: You might read it into the record.

Mr. Thomson: This is a letter addressed to myself as Public Utilities Commission counsel under date of December 3, 1952:

(Testimony of Harold Stanley Messersmith.)

“Mr. A. Dal Thomson 1 December 1952  
Public Utilities Counsel  
Office of the City Attorney, City Hall  
San Francisco 2, California.

Re: Use of Space Adjoining Hangar No. 4 and  
to the East Thereof—San Francisco Inter-  
national Airport.

“Dear Mr. Thomson:

“Referring to your letter of 11 September 1952 to  
Lew Goss requesting that TWA pay for the space  
hereinafter referred to at the rate of \$0.75 per  
square feet per annum in connection with TWA’s  
maintenance of aircraft thereon:

“Beginning with the month of January this con-  
firms that for such time as TWA does maintenance  
work [255] on aircraft on the space outlined in yel-  
low on the drawing attached hereto (and to triplic-  
ate copies hereof) TWA will accept and pay  
monthly billings from the City and County of San  
Francisco for such use of said space at the rate of  
\$2,137.50 per annum. As shown on the attached  
drawing of your Utilities Engineering Bureau (No.  
BA-10567) this area comprises 28,500 square feet.

“As we have agreed, this arrangement shall in  
no wise be construed as having any effect upon our  
respective rights or obligations under any existing  
permits or contracts or litigation in regard thereto.  
Receipt and payment by us of initial billing for the  
month of January 1953 will constitute sufficient ac-

(Testimony of Harold Stanley Messersmith.)

knowledge of our understanding in this regard.

“Very sincerely yours,

“Trans World Airlines, Inc.

“By A. R. Thompson, Jr.

“General Manager of Properties.

“P.S.: For convenience, I herewith return the permit forms transmitted by your letter of 21 November 1952 from which I have detached the referred to drawing, attaching copies of same to original and triplicate copies of this letter.

A.R.T., Jr. [256]

“CC: L. W. Goss—ART/LB—Attach.”

Mr. Thomson: Q. Now, Mr. Messersmith, what does that figure of \$2,137.50 per annum represent?

A. Well, that represents the payment of charges for the area that was—that TWA was entitled to use for ingress and egress. However, they were utilizing it for the maintenance and overhauling and servicing of aircraft. Consequently, that was brought to their attention, also the damage that had been sustained over a period of time, and it resulted in that payment.

I might advise, too, that in that letter the first figure stated, 75 cents per square foot, per annum, should be seven and one-half cents per square foot per annum.

Q. In any event, it was resolved in the figure of \$2,137.50? A. It was, that is correct.

(Testimony of Harold Stanley Messersmith.)

Q. What does that figure represent, Mr. Messersmith?

A. It represents an area of approximately 28,000 square feet that is used exclusively by TWA.

Q. Does it have any relevancy to the regular schedule of rates and charges?

A. It is in accord with the existing schedule of rates and charges.

Q. Mr. Messersmith, in 1942 and throughout the year of 1942 [257] how many scheduled air carriers were there in the whole United States?

A. Well, according to the Civil Aeronautics Administration Statistical Handbook of Civil Aviation, there were 19 Federally certified scheduled aircraft operators in the United States.

Q. How many under that heading—

The Court: Just a moment. Break that down further so I may have a better understanding of it.

The Witness: There were 19 different corporations engaged in scheduled air carrier operations, that is, passenger or passenger and mail or passenger, mail and express activities throughout the entire United States.

The Court: What date is that?

The Witness: That is—that was as of 1942.

Mr. Thomson: Q. Does that comprise the full year of 1942? A. Yes, it does.

Q. I don't know whether his Honor understands the significance of the words "scheduled air carriers." I know for a long time I didn't understand

(Testimony of Harold Stanley Messersmith.)

it. Will you explain the significance of the words "scheduled air carriers"?

A. Well, the scheduled air carrier in this instance is one that has a Federal Certificate of Competency to operate on a given route in the United States. That is issued by the Civil Aeronautics Board. [258]

The Court: You could schedule a train in the same way.

Mr. Thomson: Yes, your Honor.

Mr. Thomson: Q. There are, however, some outfits that are called non-scheduled?

A. Yes. I do not have any knowledge of any real operations of any unscheduled or irregular air carrier at that time.

Mr. Thomson: I think we would have to go to Oakland for that information, wouldn't we?

Mr. Thomson: Q. Now, these total scheduled air carriers of 19, and still referring to the whole year of 1942, how many planes were in operation by those scheduled air carriers?

A. The aircraft in service by the 19 scheduled air carriers amounted to a total of 186 aircraft throughout the United States.

The Court: What is it today, if you have it there available?

The Witness: I do not have today's figure, but I have 1948 at which time it was 878. It has grown substantially since that 1948 report, however.

Mr. Thomson: Q. Still referring to the year



(Testimony of Harold Stanley Messersmith.)

1942, how many of these 28 scheduled aircraft operated planes weighing more than 25,500 pounds?

A. This particular report does not show 1942. However, in December of 1943 it indicates that there were no aircraft operated by the scheduled aircraft domestically in the United [259] States of weights exceeding 25,500 pounds.

Q. When was aircraft exceeding 25,500 pounds first placed in service by any scheduled aircraft carrier in the United States?

Mr. Dyer: Your Honor, in line with my previous objection may the record show I object to this question and to this line of questioning on the ground that it is incompetent, irrelevant and immaterial?

The Court: Let the record so show. Objection will be overruled. I have given you the widest latitude for a number of days and he is trying to catch up with you.

A. This report of the Civil Aeronautics Administration shows that in December of 1945 there were five four-engine aircraft in operation by the scheduled air carriers in the entire United States.

Mr. Thomson: Q. I wasn't directing my question, Mr. Messersmith, to the element of four-engined aircraft. I was directing my question to the element of 25,500 pounds.

Now, how many planes were in service by any scheduled aircraft carrier in the United States in excess, at that time, of 25,500 pounds?

A. Oh, on December 31st, 1945, there were five.

(Testimony of Harold Stanley Messersmith.)

Q. Were there any more than five?

A. No, the report of the Civil Aeronautics Administration indicates a total of five. [260]

Q. By that date of December 31st, 1945, that you have just referred to, how many aircraft were there in operation by scheduled airlines which were less than 25,500 pounds? A. 416.

Q. When did the Lockheed Constellation first go into service at any place in the United States by a scheduled aircraft carrier?

A. The report of the Civil Aeronautics Administration shows that there were 16 Lockheed Constellation L-49's in service June 30th, 1946.

Q. Is that the first record of service by any Constellation?

A. That is the first record of service by a Lockheed Constellation.

Q. How many four-engined planes were in operation by any scheduled airline in December 1946?

A. The report of the Civil Aeronautics Administration indicates that on December 31st, 1946 there were a total of 17 four-engined airplanes operated by the scheduled air carriers throughout the United States.

Q. Then it wasn't until 1946, was it, Mr. Messersmith, that there were any experience or appreciable knowledge on the cost of maintenance or cost of operation of aircraft of the type of the four-engined aircraft, is that correct?

Mr. Dyer: I will object to that on the ground it is incompetent, irrelevant and immaterial. The cost

(Testimony of Harold Stanley Messersmith.)

of maintenance [261] of aircraft, the subject adverted to by Mr. Thomson, has no bearing on the issues in this case.

Mr. Thomson: Well, I think the question probably could be more successfully objected to on the ground it is leading, and I will withdraw it.

Mr. Thomson: Q. Mr. Messersmith, when did you first begin to acquire any knowledge as to whether or not planes of the Constellation type were coming into general use?

A. To the best of my recollection it was in 1943.

Mr. Thomson: You may take the witness.

#### Recross Examination

Mr. Dyer: Q. Mr. Messersmith, in response to Mr. Thomson's questions on redirect examination you referred to the Railway Express Agency and said that charges to that Agency were not charges to the airlines.

Well, now, isn't it a fact that in your schedule of rates and charges certain services are noted therein for which charges are not made to airline companies? A. I would prefer——

Mr. Thomson: Just a moment. Pardon me, Mr. Messersmith. Mr. Dyer, is your question directed to the San Francisco Airport?

Mr. Dyer: I am referring to the 1951 schedule of rates and charges of the San Francisco Airport.

Mr. Thomson: Well, wouldn't that schedule speak for itself?

Mr. Dyer: Well, I am asking him if he knows.

(Testimony of Harold Stanley Messersmith.)

The Court: Do you know? Do you understand the question?

The Witness: I do not understand the question. It is general, refers to air express rates and charges in general.

Mr. Dyer: Q. As I understood your answer to Mr. Thomson's question, it was that the Airport makes certain charges to the Railway Express Agency for the use of certain space at the Airport which it utilizes in the handling of air express, and his question, as I take it and as I recall it, is that that charge was not made to an airline company.

A. We do not bill the air express company for any utilization of the airport. The air carriers are the ones that bill the air express company for the use of airport facilities.

Q. Isn't it a fact that under your schedule of rates and charges—and I am now referring to the rates and charges at the San Francisco Airport—that there are charges therein to be made to petroleum companies for the use of wharves?

A. Yes, there is a portion of our schedule of rates and charges applicable to that phase of operations.

Q. And that, of course, is not a charge applicable directly to an air line, is it?

A. It is not a charge directly to anyone that does not use the facility. [263]

Q. Now, also isn't it a fact that you also have charges for the use of pipe lines at the Airport?

A. That is correct. That would be applicable



(Testimony of Harold Stanley Messersmith.)

either to petroleum companies, airlines, or others who may acquire those facilities.

Q. That is correct. And that may be applicable under your schedule of rates and charges to aviation companies and to other types of companies?

A. That's right. On the same terms and conditions.

Q. Yes. Now, Mr. Thomson put some questions to you, and as I understood his questions he referred to a comparison of rates under the present schedule and those under the schedule of 1942. Was there any schedule of rates and charges in 1942?

A. Yes, there was.

Q. When was the first schedule of rates and charges promulgated by the Public Utilities Commission of the City?

A. I do not have that information with me. It could be supplied by the Public Utilities Commission.

Q. Isn't it a fact the first schedule was promulgated effective September 1st, 1946?

A. No, that is not a fact.

Q. That is not a fact? Do you have any recollection at this time of when the first schedule was promulgated?

A. I would prefer to refer to the record at the Public Utilities Commission for that information. However, I can give [264] you the date that the schedule of rates and charges that was adopted prior to the consummation of the TWA lease was adopted.

Q. I see. Now, I notice that you have read from



(Testimony of Harold Stanley Messersmith.)

a document in your hand concerning a number of four-engined planes in commercial service generally during the years 1945, 1944 and 1946, as I recall. Now, isn't it a fact, Mr. Messersmith, that most of the four-engined planes in the United States were utilized by the Military during those very critical war years?

A. That is correct. The four-engined airplanes of the size of the Lockheed Constellation did not come into use until possibly 1943 or 1944.

Q. And isn't it a fact that the Lockheed Constellations were made available to the Military—

A. That's right.

Q. —in 1943 and 1944?

A. Their development was greatly accelerated because of the requirements for that type of aircraft for war use.

Q. And I take it that that document from which you read would not have statistics concerning the number of four-engined transport planes which were utilized by the Military or which had been taken over by the Military from aviation companies during the war?

A. That is correct. However, by December 31st, 1946, they had returned some of the aircraft, and at that time there was a total of 17 four-engined aircraft operating by all of the domestic air carriers in the United States.

Q. The possibility, or in fact the probability of four-engined aircraft coming into commercial use was well known at that time, isn't that so?

(Testimony of Harold Stanley Messersmith.)

A. Yes. That is why we were going before the electorate in an effort to acquire funds for the development of an airport that would provide facilities from which TWA and others could operate safely.

Mr. Dyer: That is all.

Mr. Thomson: Just a moment, Mr. Messersmith. I overlooked a question or two that I should have asked on redirect examination. If I may have the privilege of reopening the redirect examination?

The Court: You may.

#### Further Redirect Examination

Mr. Thomson: Q. Mr. Messersmith, have you prepared a chart with reference to comparison of charges at airports other than San Francisco, and including charges at San Francisco?

A. Yes, I have. It was done under my direction.

Q. I show you this. Is this the chart that you had prepared under your direction?

A. Yes. Those are comparative charges for other airports [266] and various types of aircraft, predicated on the schedule of rates and charges provided by the various airports included in the report.

Mr. Thomson: I will offer this in evidence, if your Honor please.

Mr. Dyer: I will object to it, if your Honor please, on the ground that it is improper redirect evidence. I don't recall that this subject was adverted to on cross examination.

The Court: Well, counsel, probably you didn't

(Testimony of Harold Stanley Messersmith.)

follow me. He indicated he overlooked it and the Court gave permission.

Mr. Dyer: Further object to it on the ground that it is incompetent, irrelevant and immaterial.

Mr. Thomson: Of course this subject was somewhat extensively gone into by counsel for the plaintiff in inquiry as to practices and charges at other airports. He went at great length into the practice of Los Angeles.

Mr. Dyer: May I call your Honor's attention to the fact that that subject was not adverted to by counsel for the plaintiff. I went into the subject of what type of arrangement, whether contract, lease or public utility relationship was used as to the various airports. I believe the record will sustain my statement that at no place did I advert to charges at the various airports throughout the country. As a matter of fact, I have consistently objected to evidence of that nature. [267]

The Court: You might identify this for the Court. What is it?

Mr. Thomson: This is a tabulation of— Perhaps it would be easier if I just handed it to your Honor. (Handing document to the Court). It is a tabulation of charges at various airports throughout the country.

The Court: Matter submitted?

Mr. Dyer: Yes, sir.

The Court: Objection will be overruled.

(Testimony of Harold Stanley Messersmith.)

(Thereupon tabulation of charges referred to above was admitted into evidence and marked Defendants' Exhibit F.)

Mr. Thomson: Q. Mr. Messersmith, did you take occasion in the course of your duties shortly prior to March 18, 1953, to submit to various airlines a schedule of rates and charges studies, and concession arrangements?

A. Yes, that was submitted through the office of the manager of Utilities.

Q. And was this submitted to TWA in addition to the various other airlines?

A. Pardon me, I would like to see the document to make certain.

The Court: We will take a recess so that counsel can show the witness that document.

(Short recess.) [268]

Mr. Thomson: Q. Mr. Messersmith, in the year 1951, in March or prior to March, 1951, did you have occasion to prepare any document for submission to the airlines? A. Yes.

Q. I will hand you this. Is that the document?

A. Yes, this is the document.

Q. That is headed "Interim Rate & Charge Report, San Francisco Airport, March, 1951." What in substance did this document consist of?

A. Well, in substance, it consisted of an explanation as to the justification for the 1951 schedule of rates and charges.

Q. Was this document transmitted to TWA among other airlines? A. Yes.



(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: We will offer it in evidence, if your Honor please.

Mr. Dyer: I will object to it, if your Honor please. As far as we are concerned, it is hearsay. It also, from my brief examination of it,—I have just been handed a copy—contains opinions and conclusions, and further it is self-serving, and I don't believe that it is proper redirect evidence, and I believe it is wholly irrelevant, incompetent and immaterial.

Mr. Thomson: It isn't hearsay, your Honor, in any sense, for the reason that it was submitted to TWA. Let me ask one more question:

Was there any comment from TWA on this document? [269]

A. I do not recall receiving any comment.

Mr. Dyer: I have the further objection, if your Honor please, that the schedule of rates and charges as alleged in the answer and cross-complaint may have some bearing on the issues of this case, but the underlying document and the arguments of the City in support of those rates and charges certainly shouldn't have any bearing on the issues in this case. The ultimate fact is:

What are the schedule of rates and charges?

Mr. Thomson: If the Court please, I don't think counsel is entitled to assume in his own favor a decision of the Court which would uphold the plaintiff's position in this case.

The very question, of course, is whether or not the schedule of rates and charges is applicable or



(Testimony of Harold Stanley Messersmith.)

whether the so-called frozen charges are applicable, and if your Honor should arrive at a decision favorable to the City, the contents of this document would serve to some extent to sustain your Honor as to the rates and charges to be applied.

Mr. Dyer: If your Honor please, I do not believe that the reasonableness or unreasonableness of a charge is in issue before this Court. The reasonableness or unreasonableness of a Public Utility rate, if such these charges are, is a matter solely for the determination of an administrative body. The cases, I believe, are uniform that the question of reasonableness or unreasonableness of a Public Utility rate is essentially [270] a matter for legislative inquiry through a Public Utilities Commission. This Court has only to determine whether the schedule of rates and charges applies or whether the rentals apply.

I do not believe that it is pertinent or that this Court has any jurisdiction to determine the reasonableness or unreasonableness of the rates. There are many decisions on that point, if your Honor please.

Mr. Thomson: A further ground upon which your Honor could well admit this document is that it is an official document, established by the witness to have been such, prepared in the usual course of his duties. I think the rule as to official documents is not limited to documents which might be adverse to the City.

I offer it also upon that theory.

Mr. Dyer: I think the main objection is, sir, that

(Testimony of Harold Stanley Messersmith.)

this document is not pertinent to the issues in this case, and it concerns essentially the reasonableness or unreasonableness of a rate of a Public Utilities Commission which sits in the State Building and of the City which sits in the City Hall that will consider these matters and not any judicial body of the Federal Government.

Mr. Thomson: If your Honor please, in an endeavor to shorten proceedings and in my desire not to lead the Court into any error, I will withdraw the offer at this time. [271]

The Court: It may be admitted for the purpose of identification.

Mr. Thomson: Very well.

The Court: It may assist me. I do not know fully the problems that I may meet here. You gentlemen are closer to your case, to your theory of the case. I think it might be helpful if it goes in subject to a motion to strike over your objection. It may assist the Court.

Mr. Thomson: I will withdraw my——

The Court: I am not prepared to say, so that you have an opportunity and counsel have an opportunity. I will strike it if I determine that it won't reach any of the issues of this case or whether or not it is admissible.

Mr. Dyer: I think I have stated my reasons clearly to your Honor, and at the appropriate time then I will make a motion to strike.

The Court: Very well.

(Testimony of Harold Stanley Messersmith.)

Mr. Thomson: Will it be marked as an exhibit now subject to a motion to strike?

The Court: It may go in.

The Clerk: Defendants' Exhibit G admitted and filed into evidence.

(Whereupon report referred to above was marked Defendants' Exhibit G and admitted into evidence.)

Mr. Thomson: Q. Counsel mentioned in his questioning [272] to you about the wharfage charge on the gasoline supplied. Will you enlighten us as to how gasoline first comes to the Airport?

A. The Public Utilities Commission in developing seaplane harbor facilities also made available a waterway by which the scheduled air carriers and others can effect deliveries of gasoline to the Airport via barge delivery. This development cost the City \$500,000.

The air carriers and the petroleum companies by availing themselves of the use of the waterway provided by the city are able to save approximately one-quarter of a cent per gallon of gasoline. Their consumption for the deliveries at the present time amount to approximately 30,000,000 gallons per year. We derive a wharfage fee that amounts to 25 cents per 42 gallon—25 cents per 52 gallon barrel. That means that we derive approximately \$20,000 per year for the use of these wharves and other facilities provided by the City.

Mr. Dyer: If your Honor please, I move to strike that answer upon the ground that it is not respon-

(Testimony of Harold Stanley Messersmith.)

sive and it is a volunteered statement. The question did not call for the cost to the City with reference to wharfage charges to gasoline companies.

The Court: I will allow the question and answer to stand.

Mr. Thomson: Q. Mr. Messersmith, I have a memorandum here which indicates that the actual charges are two and one-half [273] cents per 42 gallons.

A. That is correct. I believe I stated 25; two and a half cents per barrel is correct.

Mr. Thomson: You may take the witness.

#### Recross Examination

Mr. Dyer: Q. Mr. Messersmith, do you have before you a copy of the exhibit entitled "Operational Charges per Average Take-off and Landing"?

A. Yes, I have.

Mr. Dyer: If the Court please, I take it that this cross-examination is without prejudice to my motion which I have made to strike this document?

The Court: Let the record so show.

Mr. Dyer: Q. Mr. Messersmith, I notice that you list here San Diego Airport, Lindbergh Field. Does TWA operate at that point?

A. Yes, I believe they do.

Q. Do you know that of your own knowledge?

A. No, I do not. I have not landed there on a TWA airplane.

Q. Does TWA operate at the Sacramento Municipal Airport, which is the next point noted?



(Testimony of Harold Stanley Messersmith.)

A. No, they do not.

Q. Do they operate at Bradley Field, Connecticut?

A. No; I believe they operate at some of the airports, [274] possibly London and Paris I have mentioned, and Shannon.

Q. I am asking you specifically now for your knowledge of the operations of TWA at Bradley Field, Connecticut, which is shown on this exhibit. Do you have knowledge of TWA's operations there?

A. No, I do not.

Q. Memphis Municipal Airport is the next airport noted on this exhibit. Does TWA operate at that point?

A. I notice that you missed some at the top.

Q. Please answer my question now, Mr. Messersmith. A. Memphis, I do not know.

Mr. Dyer: Counsel is very competent to elicit such information as he desires.

A. I do not know.

Mr. Dyer: Q. Does TWA operate at the Memphis Municipal Airport?

A. I do not know that.

Q. You made no investigation of that fact?

A. No.

Q. Before you discover this exhibit. You next have noted Kern County. Is that the Kern County Airport near Bakersfield? A. Yes, it is.

Q. Does TWA operate at that point?

A. Not regularly, although they have gone into Bakersfield.



(Testimony of Harold Stanley Messersmith.)

Q. They have no regular schedule at that point, is that [275] correct?

A. That is correct.

Q. Your next point noted is Springfield, Missouri Airport. Does TWA operate there?

A. No, they do not.

Q. Will you tell me whether they operate at El Paso International Airport, which is also listed hereon?

A. I believe they do. I believe that was owned by them at one time; I am not certain of that.

Q. You are not certain of that? A. No.

Q. Did you make any investigation of that fact before you constructed this exhibit?

A. No; this exhibit was not prepared specifically for this purpose. This was operational charges from airports. We sent requests for such data to approximately 43 airports, and this happens to be a list of the airports that complied with our request for a copy of their schedule of rates and charges.

Q. How about Seattle-Tacoma Airport, does TWA operate at that point?

A. They do not.

Q. And again, do they operate at Oklahoma City or Will Rogers Airport which is noted hereon?

A. I couldn't answer that.

Q. You haven't any knowledge of that? [276]

A. No.

Q. Do they operate at the Love Field, Dallas?

A. I don't know whether they do or do not. I don't think they do regularly.

(Testimony of Harold Stanley Messersmith.)

Q. Do they operate at the Portland International Airport? A. No.

Q. Do they operate at Birmingham, Alabama?

A. You missed one; pardon me. Birmingham—I don't know that they operate there.

Q. Does TWA have operation in Stockton Airport which is noted hereon?

A. No regular operation.

Q. Do they have any operation there?

A. None to my knowledge.

Q. How about Minneapolis-St. Paul Airport? Do they operate there? A. No.

Q. They operate at Shannon, London and Paris?

A. That is right.

Q. The next one. Do they operate at San Juan, Cuba? A. No.

Q. Do they operate at Montreal?

A. You missed Gander.

Q. They do at Gander. Do they operate at Montreal? A. No, not to my knowledge. [277]

Q. Do they operate at Honolulu? A. No.

The Court: I will entertain a motion to strike this document.

Mr. Dyer: I move——

Mr. Thomson: I so move, your Honor, upon the ground that it is on an entirely irrelevant subject. The exhibit, as testified by the witness, was not prepared for the purposes of this case.

The Court: To stop this line of testimony, it may be stricken from the record.

(Testimony of Harold Stanley Messersmith.)

Mr. Dyer: Thank you, sir. That is all of the recross-examination.

#### Further Redirect Examination

Mr. Thomson: Q. I think, Mr. Messersmith, you might read to His Honor the rate for Shannon, which is quite interesting.

Mr. Dyer: I will object——

The Court: That will be interesting, because that is the one ride I ever had.

Mr. Dyer: They have a fine restaurant there.

Mr. Thomson: It is a credit to the Irish, yes.

A. The charge for a Lockheed Constellation at Shannon Airport runs from \$68.60 to \$71.70 per take-off. [278]

Q. What is the rate at Gander?

Mr. Dyer: Just a moment. I will object to that.

The Court: Having gone over this route, I am going to allow the testimony. I don't think it will prejudice you.

A. At Gander it ranges from \$130.00 to \$151.25.

Mr. Thomson: Q. For what?

A. For a take-off and landing.

Mr. Thomson: That is all.

#### Further Recross Examination

Mr. Dyer: Q. Do you know of your own knowledge whether TWA pays those rates at Gander and Shannon?

A. I have no knowledge of any immunity from the regular charges.

(Testimony of Harold Stanley Messersmith.)

Q. Please answer the question, Mr. Messersmith: Do you know of your own knowledge that TWA pays the rates noted hereon at Gander and Shannon?

A. No, this is predicated on the rate and charge data provided by the Airport authorities.

Q. You don't know whether those rates are applicable to any one specific airline?

A. They are listed as their schedule of rates and charges.

The Court: In any event, they have no application here? A. No.

Mr. Dyer: That is all, sir. [279]

Mr. Thomson: That is all, Mr. Messersmith.

(Witness excused.)

### GEORGE D. BURR

called as a witness on behalf of the defendants and cross-plaintiffs, sworn.

The Court: Q. Your full name, please?

A. George Danforth Burr.

Q. Where do you reside Mr. Burr?

A. 144 Aptos Avenue, San Francisco.

Q. And your business or occupation?

A. Civil engineer.

The Court: Proceed, counsel.

### Direct Examination

Mr. Thomson: Q. Mr. Burr, are you in the service of the City and County of San Francisco?

A. Yes. [280]

Q. And what was your capacity?

(Testimony of George D. Burr.)

A. I am in charge of the design for the Utilities Engineering Bureau, part of the Public Utilities Commission.

Q. And have you done any particular line of work for the City in engineering during the past few years?

A. Yes. Among other duties, design of the San Francisco Airport.

Q. When did you first come into the City employment? A. June, 1926.

Q. And when did you first indulge in the duties concerning the Airport?

A. I believe it was about August, 1926, before the Airport was established.

Q. At that time there was really no Airport at all?

A. No. The duty was to select a site and design and—design a suitable airport for the City.

Q. Did you engage in the design after the site was acquired? A. Yes.

Q. Are you a graduate of any University?

A. A graduate of the University of Washington.

Q. What was the degree which you obtained?

A. There are two degrees, one a Bachelor of Science of Civil Engineers, and subsequently a professional degree of Civil Engineer.

Q. Which degree did you obtain? [281]

A. I obtained both degrees.

Q. Oh, both of them? Yes. Are you a licensed engineer under the laws of the State of California?



(Testimony of George D. Burr.)

A. Yes, I am a licensed civil engineer and, separately, a licensed structural engineer.

Q. Will you explain how your duties varied from those of Mr. Doolin's as to planning?

A. The Utilities Engineering Bureau of the Public Utilities Commission does the engineering work for San Francisco Airport, and as part of such duties it collaborates with the manager of the Airport; and then after the overall decision has been made as to what projects are to be initiated, the details of design and construction is part of the duties of the Utility Engineering Bureau.

Q. Now, Mr. Burr, did you continuously remain in the course of your duties as an engineer for the Airport or was there some interval where you were not employed?

A. No, there was an interval when I was in the Military Service in the late war.

Q. About what year did you leave the City service temporarily?

A. On September 16, 1940, I reported for duty as Engineer and Signal Officer at the Harbor Defense of San Francisco, which was at Fort Winfield Scott in the City.

Q. To what location were you assigned temporarily?

A. Headquarters at Fort Winfield Scott in San Francisco [282]

Q. Did that take you away entirely from the Airport?

A. No, sir. I visited the Airport at that time

(Testimony of George D. Burr.)

about once a week, flying. Also conferred with Mr. Messersmith, Mr. Doolin and others.

Q. Were you an individual flyer at that time?

A. Correct. Private pilot.

Q. When did you return to your engineering duties? A. The 1st of May, 1947.

The Court: You were in in 1940, you say?

A. Yes, your Honor.

The Court: And remained until 1947?

A. Correct, your Honor.

The Court: All right.

Mr. Thomson: Q. At a period shortly prior to April 30, 1937, did you have occasion to make inquiry from the various airlines as to contemplated weights of planes?

A. Yes. Our office wrote the correspondence, made inquiry from all available sources including the airlines and the manufacturers of aircraft, others.

Q. As I understand your testimony, you wrote both to the airlines and to aircraft manufacturers.

A. That is correct. A bond issue was contemplated for the improvement of the Airport and it was desired to get information so that a suitable design could be made.

Q. There is a letter introduced into evidence by the plaintiff [283] in this case, which letter is one from Mr. Cahill addressed to the Public Utilities Commission. Who supplied the figures contained in that letter?

A. I tabulated the figures that were transmit-

(Testimony of George D. Burr.)

ted to Mr. Cahill, and he copied them from those.

Q. How were these figures compiled in the first instance?

A. They were compiled from information we gathered from these various sources aforementioned.

Mr. Thomson: (Handing document to Mr. Dyer.)

Mr. Dyer: May I have your indulgence for a moment, counsel?

Mr. Thomson: If it is all right with His Honor.

The Court: It is all right.

Mr. Thomson: Q. Is this the document you speak of in the compilation of figures, Mr. Burr?

A. It is.

Q. And is that data taken from the reports that you received from the various airlines, is that correct?

A. And also from other sources, including the manufacturers of aircraft.

Q. Yes.

A. Much of it came from the manufacturers. The data from the airlines was rather meager and much of it to the effect that, "We don't contemplate any larger or heavier planes, that we would sooner have more frequent service," and we had to draw on our conclusions primarily from what was on the drawing [284] boards or contemplated by manufacturers of aircraft.

Q. When you refer to airlines, is that inclusive of TWA?

A. I believe they were consulted. However, I did not personally do it.

(Testimony of George D. Burr.)

Mr. Thomson: I will offer this in evidence, if your Honor please.

Mr. Dyer: May the record show the date of that document, please?

Mr. Thomson: There is a stamp at the foot of the document, "Received April 3 of 1937, L. W. Stocker."

Mr. Thomson: Q. Who is Mr. Stocker?

A. He was at that time in charge of design. I was in charge of the design for the Airport as of that date.

Q. Is he now with the City and County of San Francisco?

A. No, he has since retired.

Q. Yes, but I mean at that time he was.

A. He was, yes.

Mr. Thomson: I will offer this in evidence, if your Honor please.

The Court: It may be admitted and marked.

The Clerk: Defendants' Exhibit H admitted and filed in evidence.

(Thereupon tabulation of figures admitted into evidence as Defendants' Exhibit H.)

Mr. Thomson: Q. Mr. Burr, did you observe anything on [285] the surface of the Airport of an unusual nature within the past few years?

Mr. Dyer: I object to that on the ground it is incompetent, irrelevant and immaterial; no foundation laid.

The Court: Objection is sustained.

(Testimony of George D. Burr.)

Mr. Thomson: Q. Mr. Burr, what year did you say you returned to the Airport?

A. 1st of May, 1947.

Q. 1947? After the 1st of May, 1947, did your duties comprehend visits to the Airport?

A. Yes.

The Court: However, during that interval, if I follow his testimony, he visited it about once a week.

Mr. Thomson: Yes, while he was at Fort Scott.

A. Not continuously, your Honor.

The Court: Was it continuous up until 1947?

A. Up until about May or June of 1945, at which time I went overseas.

Mr. Thomson: Q. What did you observe after you came back to the Airport with reference to the condition of the surface of the Airport?

Mr. Dyer: I object to that on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection will be overruled. You may answer if you observed anything unusual. [286]

A. One of the first things that was observed was the apron in front of the terminal was deteriorating quite rapidly. The apron in front of the hangar—it is one, two, three, four, and partially in front of Hangar No. 5—was deteriorating quite rapidly.

I observed that taxiways leading to these aprons were deteriorating. There were some heavy aircraft operating and it became necessary as an emergency procedure to at once prepare means of preventing a complete collapse and airplane wheels crushing into



(Testimony of George D. Burr.)

the pavement, through the pavement into the soft mud beneath.

Mr. Thomson: Q. About what date did you make this observation?

A. It was in May, about May of 1947.

Q. Amongst these hangars that you have described by number, were any of those in occupancy by TWA?

A. Hangar No. 4 was, to my knowledge. I believe Hangar No. 5 was, at that time too.

Q. Mr. Burr, you have with you certain photographs? A. Yes.

Q. I will have to show these to counsel before I can ask you to describe them.

A. This photograph——

Q. No, don't say anything now. I will show these to counsel (handing photographs to counsel). [287]

Mr. Thomson: Q. Mr. Burr, I will show you this photograph here and ask you what that depicts?

A. This is a photograph of San Francisco Airport taken from the southwesterly direction, showing the Airport as it existed on the completion of Airport Contract No. 82.

Q. What date was that, approximately?

A. That was—I would refresh my memory on that—that was May, 1947, or possibly in June.

Mr. Thomson: I was mistaken in what I told you, Mr. Dyer. I will ask that this photograph be admitted into evidence.

Mr. Dyer: I will object to that, if Your Honor

(Testimony of George D. Burr.)

please, on the ground that it is incompetent, irrelevant and immaterial. And no foundation has been laid to show that there was no contemplation in the minds of the parties that planes in excess of 25,000 pounds gross take-off weight would come into use after the date of this.

The Court: It may be admitted and marked.

Mr. Dyer: In order to save the Court's time, may it be deemed I am objecting to all these photographs?

The Court: It may.

Mr. Dyer: And all this evidence along this line?

The Court: Let the record so show.

The Clerk: Defendants' Exhibit I, in evidence.

(Photograph referred to was marked Defendants' Exhibit I in evidence.) [288]

Mr. Thomson: Q. I show you the next photograph, Mr. Burr, and ask you what that depicts and as of what date?

A. This photograph with the "B" marked on the back of it is a photograph of—aerial photograph of the San Francisco Airport as of May 15, 1940, as viewed from the southeasterly direction, and show the extent and the landing field as it existed in 1942, with the exception that pavement had been laid on runway eighteen thirty-six—that is 18-36—and 10-28, to the extent of 4,500 feet on runway 18-36 and 6,000 feet on runway 10-28.

Mr. Thomson: I will offer this photograph last described by the witness in evidence.

The Court: It may be admitted and marked.

(Testimony of George D. Burr.)

The Clerk: Defendants' Exhibit J admitted and filed in evidence.

(Thereupon photograph referred to above was marked Defendants' Exhibit J in evidence.)

Mr. Thomson: Q. I show you this photograph, Mr. Burr, and ask you what it depicts and as of what date?

A. The photograph in my hand was taken October 16, 1938, and depicts the apron in front of the Airport Terminal. It is the same configuration of apron, and for the most part the pavement is the same pavement that existed in that area on October 1, 1942. It also shows Hangars No. 1, 2, 3 and 4.

Q. The apron you referred to is the same apron that you have [289] previously described in your testimony?

A. That is correct. I said for the most part the pavement is the same. The taxiway showed asphaltic—this shows asphaltic pavement at the time of it. It was subsequently changed to concrete pavement and concrete pavement existed in 1942.

Mr. Thomson: I will offer this last photograph described by the witness in evidence and ask it be admitted into evidence.

The Court: It may be admitted and marked.

The Clerk: Defendants' Exhibit K admitted and filed in evidence.

(Testimony of George D. Burr.)

(Thereupon photograph referred to above was marked Defendants' Exhibit K and admitted into evidence.)

Mr. Thomson: I have just one more photograph, Your Honor.

Mr. Thomson: Q. I show you this photograph and ask you to describe what it depicts and as of what date?

Mr. Thomson: That was, according to the testimony of the witness, 1938.

The Court: That is the first one?

Mr. Thomson: Oh, pardon me, I thought you were referring to the last one.

The Court: It isn't marked.

Mr. Thomson: Q. Mr. Burr, may I interrupt you a minute? Go back to this first photograph. I believe you testified a certain date. What did that represent? [290]

A. On the back of it I will write the approximate date.

Mr. Thomson: Will that be agreeable with reference to the year, Your Honor?

The Court: No objection to that?

Mr. Dyer: No objection.

The Court: We want it identified is all.

A. Which, as I previously testified, was about May or June, 1947.

Mr. Thomson: Q. Now, we will take these in order. Will you kindly mark——

A. There is a photograph here that has not been identified.

(Testimony of George D. Burr.)

Q. I understand. We haven't gotten to that yet. Will you kindly mark the condition of the Airport as of a certain date depicted in that photograph?

A. It is essentially the Airport that was constructed at the time the lease was entered into with TWA.

Q. Suppose you mark this, then. I would suggest you mark this October, 1942, which is the date of the lease.

A. It isn't—. The picture was taken May 15, 1940.

Q. Yes, but you testified—I think in the interest of clarity it will be agreeable to His Honor and counsel to put down the date of October, 1942, because that is the date the photograph depicts, regardless of the time of taking. Do you see what I mean? You have testified it depicts the condition in October, 1942. [291]

A. It would take considerable writing. As I mentioned in the testimony, one depicts the difference. The difference is——

Q. (Interposing) You outlined that in the testimony. That will be perfectly clear.

Mr. Dyer: I would like to be clear on this. Mr. Burr, does that represent the condition shown in that picture in October, 1942?

The Court: 1940.

Mr. Dyer: 1940?

The Court: If I followed his testimony.

Mr. Thomson: The photograph was taken in 1940, but he testified that with certain exceptions



(Testimony of George D. Burr.)

which he described it depicted the condition in 1942.

A. The landing is identical but the pavements were added.

The Court: I understand, but I want to know definitely the date the photographs were taken.

Mr. Thomson: If that is what Your Honor prefers, we will do it that way. Suppose we clear this up after luncheon?

The Court: You may.

(Thereupon this cause was adjourned to the hour of 2:00 o'clock p.m. this date.) [292]

### GEORGE D. BURR

called as a witness on behalf of the defendant, resumed the witness stand, previously sworn.

#### Direct Examination—(Resumed)

Mr. Thomson: Q. Mr. Burr, before adjournment you were about to identify this photograph which I now hand you. What does that depict?

A. The photograph in my hand depicts the existing terminal area. The photo was taken on April 1st, 1951 and shows in essence how the aprons and adjacent taxi-ways were reconstructed in order to carry the heavier aircraft and larger volume of business.

Q. Was this photo taken after your reconstruction? A. It was.

Q. Would you be good enough to mark the date

(Testimony of George D. Burr.)

when it was taken in accordance with what you have done on the other three? A. It is marked.

Mr. Thomson: I will offer this in evidence, if Your Honor please.

The Court: Let it be admitted and marked next in order.

The Clerk: Defendant's Exhibit L admitted and filed in evidence. [293]

(Thereupon photograph identified above was received into evidence and marked Defendant's Exhibit L.)

Mr. Thomson: Q. Mr. Burr, I have been requested to ask you to speak a little more loudly. I have probably been guilty of the same fault myself.

I will hand you this photograph, Mr. Burr, and ask you what that represents?

A. The diagram in my hand is an aerial photo of the San Francisco Airport taken about the year 1931 and on which has been marked in white the various stages of development.

Q. Those markings in white figures are additions to the photograph?

A. They are additions, yes.

Q. And do those markings bring the improvements and development at the airport down to date?

A. Approximately to date. There have been a few additions beyond what is shown in here—a number of additions.

Q. Do you want to, in the interest of clarity for

(Testimony of George D. Burr.)

the record, enumerate those additions that are not shown, very briefly?

A. It has been necessary to extend the length of Runway 10-R, 28-L.

Q. To what extent?

A. Oh, about 500 feet. It has been necessary to add a warm-up apron at the easterly end of that runway. [294]

It has been necessary to extend Runway 19-R and 1-L to the north about 700 feet and add a warm-up apron at both ends of that runway, and add a considerable number of taxi-ways for the safe and convenient operation of aircraft.

Mr. Thomson: I will offer this document last described by the witness in evidence, Your Honor.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit M admitted and filed in evidence.

(Thereupon photograph identified above was received into evidence and marked Defendant's Exhibit M.)

Mr. Thomson: Q. I will hand you this photo that appears to be an aerial photo and ask you to describe what that depicts?

A. The photograph in my hand was taken in about December 1950. It shows the general configuration of the landing field about as it exists today. Again, there have been additions since that, the total cost of which are in the neighborhood of ten to twelve million dollars.

Q. The additions?

A. Yes.

(Testimony of George D. Burr.)

Q. Are they substantially of the nature you described with reference to the diagram?

A. Yes. In addition there is a new terminal. There are additions to the runways and taxi-ways and aprons, however.

Q. The date when this was taken appears here at the back, [295] does it not?

A. It is written on the back.

Mr. Thomson: I offer this in evidence as our next exhibit, Your Honor.

The Court: It may be admitted.

The Clerk: Defendants' N admitted and filed in evidence.

(Thereupon the photograph identified above was received into evidence and marked Defendants' Exhibit N.)

Mr. Thomson: Q. Mr. Burr, I hand you this diagram which is labeled "Master Plan", and I will ask you to describe to His Honor what these different colors of blue and yellow upon that diagram represent?

A. The plan in my hand, with the file number RA10511, revision number 8, is the current general plan of the San Francisco Airport. The marking that is shaded in blue depicts the Airport and its landing field as it existed on October 1st, 1942, which was its condition at the time the lease was entered into with TWA. The yellow areas are the additional areas that it has been necessary to construct at a total cost of in excess of forty million dollars.

(Testimony of George D. Burr.)

The Court: Is TWA confined in that blue area still?

The Witness: This was the whole Airport as at that time and was intended to be all of the airport that we would need during the life of——

The Court: Maybe I confused you. Are they within that [296] area now or do they utilize——

The Witness: They utilize this entire field which is the field depicted in the exhibit which you have in your hand.

Mr. Thomson: Q. In other words, I take it, Mr. Burr, that TWA uses runways as extended?

A. The runways, taxi-ways and aprons.

Q. That presently exist?

A. And the other facilities, including lighting and drainage and the other aids to air navigation and facilities such as approach lights and radio.

Mr. Thomson: If Your Honor please, I offer this in evidence as our next exhibit.

The Court: Let it be admitted and marked.

The Clerk: Defendants' Exhibit O admitted and filed in evidence.

(Thereupon diagram identified above was received in evidence and marked Defendants' Exhibit O.)

Mr. Thomson: Q. I refer you to Defendants' Exhibit H, consisting of a compilation of figures, Mr. Burr, and you testified as I recall, that that was prepared under your direction?

A. That is correct.

Q. After the preparation of that exhibit what did you next do?



(Testimony of George D. Burr.)

A. An analysis was made of the entire situation with the conclusion that for the foreseeable future—by that I mean [297] within at least ten years—a field designed for capacity operation for aircraft of maximum weight of 25,000 pounds would be sufficient. A field so designed would permit limited operation of aircraft of the weight of about 40,000 pounds, and occasional operation of aircraft up to about 75,000 pounds. The field was adequate for those purposes and if aircraft had not exceeded those weights, it would still be used.

Q. I call to your attention, Mr. Burr, one item on the first page with reference to Boeing, and that is the item of 70,000 pounds.

A. Yes.

Q. Did you receive that information as to the possibility of a plane of 70,000 pounds?

A. The information came in a letter that Boeing Aircraft Company asked us to keep confidential, and it was an intended design. The aircraft was never built and never used.

Q. How did you regard that information as to the 70,000 pound plane when you received it?

A. I considered it an extremely remote possibility; that is, that if such an aircraft ever were used, it would be used in such a small proportion of the total aircraft as to have no bearing on the design; it would have been within the very limited operation under 75,000 pounds that we could handle with the facilities we were building. [298]

Q. Will you explain to us, please, Mr. Burr, the

(Testimony of George D. Burr.)

distinction that you have referred to in engineering concept between frequent operation and infrequent operation and what effect those two respectively have upon an airport?

A. Perhaps I could illustrate that best by a confidential report prepared by the United States Engineers, Office of District Army Engineer, dated the 14th of July 1944, and finally revised the 10th of April 1945. This report was prepared at the instigation of the Chief of Engineers by letter dated August 1943, at the time the increased weights of aircraft in use became apparent through the war time development.

So at the time he finished this report—that is the District Engineer finished the report—he came to the conclusion that for the definition of capacity operation as the Army Engineers and the Air Force use it, which is a heavier design than is normal for civil aircraft—that for capacity operation the air field was limited to 18,000 pounds and for limited operation it was limited to 28,000 pounds.

Now to make it plain, in direct answer to your question as to what he intended by capacity operation. As defined by the Army Engineer, “Capacity operation is defined as the maximum traffic that can possibly operate on an air field for a period of approximately 20 years. The daily operation may be assumed as varying from 100 for very heavy airplanes [299] to 1500 for very light-weight airplanes.”

(Testimony of George D. Burr.)

Q. What is meant by those figures?

A. The Army and the Air Force in 1945 at the date of this report considered a heavy bomber or a heavy transport as weighing between 30 and 65 thousand pounds. That was the limit which the design concept had reached.

Shall I proceed with the definition?

Q. Yes, please.

A. "Limited operation is defined as few operations a day for a period of approximately 20 years; that is, about 10 per cent of the capacity operation, or as the maximum traffic that can possibly operate for a period of two to four years. However, the use of pavement rated for a limited operation by the maximum traffic that can possibly operate for a period of two to four years may entail a greater yearly maintenance than would a field rated for capacity operation.

"Repetition of loads is a factor in the design of both flexible and concrete pavements. One or two or even a hundred landings made by a very heavy plane on a pavement designed for lighter loads is relatively insignificant. For example, no immediate damage or break-through will occur if a plane having a gross weight of 120,000 pounds lands on a pavement properly designed for capacity operation of planes [300] having a gross weight of 30,000 pounds. However,"——

The Court: Pardon me. Would you elaborate on that? Go back?

(Testimony of George D. Burr.)

Mr. Thomson: I think His Honor wants you to read back.

The Witness: Read this?

The Court: Yes.

Mr. Thomson: Read it slowly.

The Witness: Repetition of loads is a factor in the design of both flexible and concrete pavements. One or two or even a hundred landings made by a very heavy plane on a pavement designed for much lighter loads is relatively insignificant. For example, no immediate damage or break-through will occur if a plane having a gross weight of 120,000 pounds lands on a pavement properly designed for capacity operation of planes having a gross weight of 30,000 pounds."

In other words, Your Honor, the concept there is, as enunciated by the Army, that a pavement designed for capacity operations of 30,000 pounds could take occasional landings and take-offs of planes weighing about 120,000 pounds, which follows our design concept without knowledge of this report at the time, that if we designed for a capacity operation of 25,000 pounds, we could take occasional landings of aircraft weighing up to 75,000 pounds without serious trouble. [301]

The Court: Go ahead. I may add I am having some difficulty following this. Proceed. And I say that kindly. Can I get any help from either side here?

Mr. Thomson: Well, I take it, Your Honor, that the witness and the author of that report is endeavoring



(Testimony of George D. Burr.)

oring to find out—it is somewhat similar to a figure of speech I might use, skating on very thin ice: If you go fast enough and you do it just once in a while, you can get away with it. And I think the same situation from the standpoint of engineering is true with respect to the Airport. What I have said is just about correct, Mr. Burr, from an engineering standpoint?

The Witness: That is correct; it takes actual work to——

The Court: All right. What is the necessity of this?

Mr. Thomson: It is consistent with out contention that we did not anticipate regularly scheduled air flights of these tremendous weights coming down in uniform and definite schedules of a number per day. That is the theory of this testimony, Your Honor.

Mr. Dyer: Your Honor, I take it that this testimony is going in subject to the objection that we made at the start of this testimony; and I might point out at this time that the reference here for instance is to capacity operation of the Airport, which we understand is the maximum number of movements that the field will take. And I don't think that [302] that is applicable to TWA. I think the evidence is very clear in this case that at the times in issue here that we either did not have any heavy planes in use over 20,000 pounds, and to the extent that the evidence herein refers to a period after April 1, 1945, that we had at most one landing



(Testimony of George D. Burr.)

and one take-off a day for planes of 54,000 pounds gross take-off weight. Mr. Messersmith testified that that was a relatively minor use. So it would seem to me that this evidence is wholly irrelevant and immaterial as applied to the situation at issue here.

Mr. Thomson: I take it, Your Honor, there is no borderline on 1945. The situation still prevails today and projected into the future with which Your Honor will be concerned.

The Court: I was the one who was confused and I was trying to have you gentlemen take me out. Proceed.

Mr. Dyer: With reference to Mr. Thomson's remarks, may I point this out: that the pleadings show that in 1946 they undertook to repair the Airport and completed those repairs in 1948, and that since that time these runways have been entirely adequate to take very heavy planes, not only planes operated by TWA but planes of much heavier weight. I think the crucial time in this case is the time before 1946, and I believe that the evidence is quite clear that at that time we operated planes of relatively light weight and operated them very infrequently, and I believe this evidence goes to a [303] great extent to capacity operation in the Airport by heavy planes. I don't think that is at all binding on TWA or applicable to the situation here.

Mr. Thomson: I don't think, counsel, that you have successfully followed the testimony of this witness in the definition of capacity operation. That

(Testimony of George D. Burr.)

is clearly defined there, and I will ask Mr. Burr to go back to that point.

Mr. Dyer: I think we have made our position clear, Your Honor. I would like it to be understood that my objection runs to all this line of testimony.

The Court: The record so shows. Proceed.

Mr. Thomson: Q. Have you finished, Mr. Burr, in reference to the extract? If you have, temporarily——

A. No, sir.

Q. I am going to put another question to you.

A. Temporarily.

The Court: Proceed.

Mr. Thomson: Q. Do you want to proceed? Very well.

A. "However, repeated operation would soon completely destroy the pavement. Heavy planes can operate on pavement designed for lighter planes for a short period of time or a few repetitions, but it is emphasized that this does not mean such pavements are adequate or will be satisfactory for limited or capacity operation. Continued use by planes heavier than the pavement [304] capacity will mean excessive maintenance or complete reconstruction prior to the anticipated life stated above."

Another definition of capacity and limited operation——

Mr. Dyer: Pardon me, Mr. Thomson; I wanted to refresh my recollection on it. Would you identify the document the witness has been reading from?

Mr. Thomson: Let the witness identify it.

Mr. Dyer: Thank you.

(Testimony of George D. Burr.)

A. The document being read from is titled "Restricted; U. S. Engineers Office, San Francisco, California. Air Field Pavement Evaluation Report, San Francisco Municipal Airport, dated 14 July 1944; Final Revision 10 April 1945."

Mr. Dyer: May I see that document, please?

The Witness: (The document was handed to counsel.)

Mr. Thomson: My next question relates to the document, so I will wait until you finish your inspection.

Mr. Dyer: Thank you (returning document to witness).

Mr. Thomson: Mr. Burr can put it in your possession during recess if you would like to look at it further, gentlemen.

Q. Mr. Burr, is there any classification or evaluation of the capacity of the San Francisco Airport as shown in that report?

A. The report of the Army Engineers gives an evaluation of the pavement for capacity operation as 18,000 pounds and for [305] limited operation as 28,000 pounds. Our own—as I previously testified, the Army's definitions are for 20 years operation without high maintenance cost. Our conception has been roughly for in excess of ten years. Therefore our evaluation of the pavement for capacity operation was 25,000 pounds and for limited operation 30,000 pounds and for occasional operation only of 75,000 pounds. If we would have planes in excess of 75,000 pounds, such as the Lockheed

(Testimony of George D. Burr.)

Constellation, we could expect immediate failure, and that is exactly what happened.

Q. Is there any enumeration in that report of the weights of Army bombers or Army transports?

A. Very heavy bombers and transports are classified as between 30 and 65 thousand pounds in 1945.

Q. Is there any enumeration in that report of the number of trips per day into the San Francisco Airport of bombers or transports?

A. Yes, there is.

Q. What is set forth in that connection?

Mr. Dyer: Will you fix the time, please? May I have that done?

Mr. Thomson: These times are given year by year and will be enumerated by the witness. The date of the report you already have. It takes it up year by year. [306]

A. In the year 1940 the traffic history as compared by the Army Engineers at the San Francisco Airport for heavy bombers and heavy transports of the weight of 30,000 to 65,000 pounds gross was eight one-hundredths, or was one trip a day; in 1941 was fourteen one-hundredths, one trip a day. In 1942 it was 5.5 trips per day. In 1943 it was 10 trips per day. And currently, which is the date of the report in 1944, 14 trips a day.

And a trip is defined as a landing counting as one unit and a take-off as one, so that would compare to an airline schedule, two units of that would equal one airline schedule.



(Testimony of George D. Burr.)

Q. If I understand you correctly, where it says, for example, "10 trips a day" you would have to divide by one-half to get the number of landings?

A. That would be five schedules.

Q. And one-half to get the number of take-offs?

A. That is correct.

Q. In your further planning of the Airport did you place any reliance upon that report from which you have read, from the Army?

A. Yes. It has been extensively used in the construction following the 1945 bond issue.

Q. Now, I have reference at present, Mr. Burr, to the work of improvement at the Airport commencing in May of 1946 and being completed in May of 1947. Will you describe to His Honor [307] in general the nature of that work?

A. Could you repeat that?

Q. Yes. I have reference to the work of improvement at the Airport which commenced in May of 1946 and which was completed one year later, in May of 1947.

A. That, I presume refers to Airport Contract No. 82?

Q. Yes.

A. That was in general for the extension of the landing fields, and comprised primarily about 6,000,000 yards of fill, some pavement, some drainage, and some other work, the cost of which was \$4,352,350.71. It is shown on the exhibit titled "Master Plan" and marked "Airport Contract No. 82".



(Testimony of George D. Burr.)

Q. What relationship did the drainage have to the remainder of the work?

A. The drainage was primarily appurtenant to the fills being placed, although there was other drainage, too, that went in with it.

Q. By the way, to digress for a moment, you have already testified to the improvement of the apron area immediately adjacent to the present Terminal Building. Just about what was involved in that work?

A. The apron immediately east of the Airport—the existing Airport Terminal Building, as I previously testified, had failed soon after the Lockheed Constellations began to operate from it to such an extent it was impractical to conduct operations [308] of the Airport unless immediate actions were taken.

An emergency purchase was made of so-called B-29 steel landing mats which covered the area, and the contract was rushed out.

That contract was titled “Airport Contract No. 96.” The apron was improved sufficiently to carry the loads that were then currently operating at a cost of about \$525,000. The nature of that repair was to raise the level by adding pavement materials a distance of two to three and one-half feet.

Q. That was an increase in height?

A. That is correct.

The Court: Is that what you call a loading strip?

A. That is the apron on which the aircraft un-

(Testimony of George D. Burr.)

loaded their passengers and cargo and at which they are loaded while they stand.

The Court: That is what the records describe as a loading strip?

Mr. Thomson: Yes, Your Honor, that is the correct term.

Mr. Dyer: Yes, it is a loading strip, I understand, sir, not only for TWA but other airlines.

Mr. Thomson: The testimony of this witness was that he discovered defects in the loading strips, inclusive of the area immediately adjacent to TWA hangars.

A. Your Honor, on Plaintiff's Exhibit—rather, Defendants' Exhibit L, the apron referred to is this I am delineating [309] (showing document to the Court) that is immediately east of the existing Airport Terminal Building.

The Court: The language of the previous witness referred to a loading strip. Where would that be?

A. That is where the loading strip is, down here (indicating).

The Court: All that area?

A. Yes, the various positions there.

The Court: That is what I was trying to ascertain. All right.

Mr. Thomson: Q. Mr. Burr, was that increase in the length or the width of those aprons, or rather that loading area?

A. In order to accommodate the increase—rapidly increasing volume of business, number of air-

(Testimony of George D. Burr.)

line trips, the width of the apron was increased from 251 feet to 661 feet. It was also lengthened.

Q. Do you recall the extent of the lengthening, offhand, approximately?

A. Not offhand. I could scale it. Very substantial.

Q. Now, I am referring to some work at the Airport initiated in April, 1947, and completed in March of 1948. Have you in mind the nature of that work?

A. The work I presume you refer to is Airport Contract No. 93?

Q. That is correct.

A. Which was constructed at a cost of \$3,-745,595?

Q. Yes. [310]

A. It involved primarily about 5,000,000 cubic yards of fill to extend the landing field, including some pavement, some drainage and other miscellaneous cost, primarily appertaining to the construction of these fills which extended the landing field.

Q. When the runway was extended in the manner you described, in which direction of the Airport was it extended?

A. Extended in a southerly and easterly direction, primarily.

Q. Well, was that on dry land or out into the Bay?

A. It was out into the Bay, reclaiming lands that were formerly under water.

(Testimony of George D. Burr.)

Q. What was the reason for going out into the Bay?

A. The extension was placed to the east and south primarily in order to improve the traffic circulation plan and for the safety of the aircraft and communities adjacent.

It allowed the aircraft on take-off to turn before reaching many of the built up communities and thereby add to the safety of the passengers, the aircraft and the communities. And further, it allowed them to turn short of the higher ground that rises to the west.

I have an exhibit here, if you would care to see it, to illustrate the point.

The Court: Do they go across the Bay?

A. No, sir, up around the Skyline Boulevard.

The Court: Around Skyline Boulevard? [311]

Mr. Thomson: Q. I think His Honor might be interested to see that picture you refer to, Mr. Burr.

A. The drawing I have in my hand is titled "Topographical Vicinity Map", and written in lead pencil on it is, "To conform with TSON-18 of April 26, 1950". The file number is CA-10594.

The Court: Now, where do those runways go from the water?

A. The Airport as it existed in 1942 was about in this area (indicating). It extended to the east, into the waters of San Francisco Bay and to the south, primarily over waters of San Francisco Bay.

You will notice these contours delineate the higher ground. It was impractical to extend in this

(Testimony of George D. Burr.)

direction as it would bring the landings—the take-offs to these hills, and also for the safety of the communities allows these turning zones to be going east to avoid an excessive number of turns over the build up communities adjacent to the west.

Mr. Thomson: Q. I would like to have that diagram, Mr. Burr, to which you have just referred. I offer this diagram which has been discussed in evidence, Your Honor please.

The Court: It may be admitted next in order.

The Clerk: Defendants' Exhibit P admitted and filed in evidence.

(Thereupon diagram referred to above was marked Defendants' Exhibit P and admitted into evidence.) [312]

Mr. Thomson: Q. Mr. Burr, you mentioned this figure of \$3,745,000 on this contract we have just been discussing. You described the work in general. Is there anything you wish to add?

A. The work was essential to handle the heavier aircraft and the aircraft of higher performance characteristics, to safely conform to the Civil Aeronautics Administration Order T6A which defines the requirements for an Airport handling this type of aircraft.

Q. Now, I refer you to certain work that was initiated in August of 1947 and completed in February of 1948. Will you describe in general and in substance the nature of that work?

A. The work you refer to is Airport Contract No. 96?



(Testimony of George D. Burr.)

Q. That is correct.

A. To the pavement, drainage and related work. The work was primarily for the repair of the apron lying just east of the existing Terminal. It also was for construction of a taxiway, so-called Taxiway No. 5.

The first concrete pavement at the Airport as thick as 13 inches was constructed under this contract. Under contract 82, previously described, the pavements were constructed of concrete 11 inches thick. Previously the Army in constructing what they considered heavy pavements, the pavements were 10 inches and thinner in thickness. We are now constructing pavements up to 16 inches in thickness to carry current weights [313] of aircraft.

The Court: Do you put that down on top of the old construction?

A. Yes, Your Honor. Many times we have had to build up as much as five feet in thickness over the old pavements.

Been tremendously expensive.

Mr. Thomson: Q. Do you recall, Mr. Burr, what you did with the landing mats that you have been mentioning in your testimony?

Mr. Dyer: I object to that, Your Honor. It is obviously irrelevant and immaterial, what he did with them. I don't think it has any bearing on the issues in this case.

Mr. Thomson: I am going to prove to this wit-

(Testimony of George D. Burr.)

ness they were left there and a separate charge for those. They were simply left in the pavement.

The Court: Proceed.

Mr. Thomson: Q. Do you recall how the landing mats you have testified to were dealt with?

A. The steel landing mats were laid over the then-existing concrete pavement for practically its whole area at the apron east of the existing Terminal Building and on the adjacent taxiway, and as the pavement was built up in thickness to two or three and one-half feet, as I previously described, they were buried and incorporated into the new pavement.

The Court: In other words, you left them there?

A. That's right.

Mr. Thomson: Q. Do you recall the cost of those landing mats?

A. I do not recall at the moment.

Q. In your memorandum there the figure of \$953,954.95, which is the figure you just testified to. Did you see anything there in connection with that figure which would be indicative of landing mats?

A. I personally prepared this table, which had several hundred items on it, and I may have put it in there but I can't find it at the moment.

Q. I will withdraw the question.

What is the grand total of the improvements in the common use facilities of the Airport expended since 1942?

A. The improvements expended for improving the common facilities at the Airport for the period

(Testimony of George D. Burr.)

of October 1, 1942, to March 9, 1951, were \$23,811,644.16. There have been extensive improvements put in since that time, however.

Q. Could you approximate that figure, confining it to common use facilities?

A. If the new Terminal now under construction is defined as a common use facility, the expenditure would be in the neighborhood of \$12,000,000.

Mr. Thomson: You may take the witness. [315]

### Cross Examination

Mr. Dyer: Q. Mr. Burr, as I recall your testimony, you took a temporary leave from your duties at the Airport to serve in the Army of the United States in 1940, is that correct?

A. That is correct.

Q. And you were thus not actively employed by the City in 1942 when this lease was executed, is that true, sir?

A. That is true.

Q. And you at no time were employed in your personal capacity as Airport Engineer during the war years, isn't that correct?

A. That is true. Not employed or receiving pay for it.

Q. During the period of 1944, which I understand is the period covered by that report that you adverted to, you were not then in close contact with the activities of the Airport, were you?

A. Yes, I was.

(Testimony of George D. Burr.)

Q. You were not then in your capacity as Airport Manager, were you, sir?

A. No. As previously testified, I was the Engineer Officer of the Harbor Defense in San Francisco in that period, on close contact with the District Engineer, United States Army, in that capacity, and also was a frequent visitor at the Airport.

Q. Yes. You left this country, as I recall your testimony, [316] in 1945 and returned sometime in 1947?

A. That is correct.

Q. And you were thus not at the Airport yourself or in touch therewith personally during the period when the Boeing Stratoliner first came into use, isn't that so?

A. I wasn't in this country, but I wouldn't say I wasn't in touch with them entirely.

Q. And you were not in this country when the Constellation first came into use, isn't that so, sir?

A. I wasn't in this country.

Q. With reference to the report of 1944 to which you have referred, was that information gained by somebody else or was it gathered by yourself?

A. I did not understand the first part of that question.

Q. Let me put it this way, Mr. Burr: Did you personally participate—. Did you personally prepare the data which appears in the 1944 report referred to by you?

A. The report? Are you referring to the report of the Army Engineer?

Q. Yes, sir, I am.

(Testimony of George D. Burr.)

A. That was prepared by the Army Engineer's office.

Q. It wasn't prepared by you?

A. It wasn't prepared by any City employee.

Q. Yes. And it wasn't prepared under your direction?

A. It wasn't prepared under the direction of any City [317] employee. It was prepared by the United States Army Engineers. It was classified at that time. The only copy in existence that I know of is a photostat that I obtained after I returned from military duty, which is the copy that we have had before us.

Q. So the data contained in this report, that isn't derived from your own knowledge of it, sir? It is derived from somebody else's investigation or knowledge, that is correct, that is, the Army Engineer?

A. That report, as I mentioned, was merely presented to substantiate the same line of opening approach to design of Airport by the United States Engineer's Office as we use in our own office.

Q. I see.

A. Prepared independently of our office.

Mr. Dyer: Your Honor please, at this time in addition to the grounds for the motions which I will make to strike, I wish to add to those grounds the motion that this report is entirely hearsay, and I move to strike it on that basis.

Mr. Thomson: Your Honor please, the report was read by the witness with the acquiescence of coun-



(Testimony of George D. Burr.)

sel in that no objection was put to it. I take it counsel has no right to make a motion to strike without at least objecting in the first instance.

Mr. Dyer: If the Court please, I understood that I was [318] objecting to all this testimony, and that at the proper time some more motions to strike would be made; and at this time I simply wish to indicate clearly to the record the ground upon which that motion will be made.

The Court: Why didn't you make a motion directly in relation to this report?

Mr. Dyer: Because it didn't appear at the time, sir. This testimony went in along with all the other, and it didn't appear that this report was based on knowledge and information of somebody else.

Mr. Thomson: I think, your Honor, in all fairness a special objection should have been interposed. While it is true counsel has objected in the form of a blanket objection, his objection was not specific enough to cover this particular ground of hearsay. He objected on the general ground that no evidence should be received at all as to this report. His objection was blanket, and he has been accommodated by the ruling on the part of the Court, to which I, in my small capacity, acquiesced that his objection as made would be deemed to follow evidence along that line.

But here we have for the first time a special objection that this is hearsay. That objection has never been covered by the blanket objection, and the evidence having been received without objec-

(Testimony of George D. Burr.)

tion, not covered by the blanket [319] objection, is not now subject to a motion to strike.

Mr. Dyer: I believe the record will show, your Honor, that along with the other grounds of objection I have made I have indicated to your Honor that some of these documents are subject to the objection of hearsay.

Mr. Thomson: I have heard no such objection.

Mr. Dyer: May I also point out that this testimony was given by way of oral testimony by this witness, and there was no opportunity given to counsel at the time, under the understanding that a motion to strike would be made and that a blanket objection was interposed to all this testimony, to take the witness on voir dire at the time.

The Court: Counsel, this document——. Well, it is hearsay, and I don't think for the purpose of the case that it would be well to make up a record under those conditions.

Mr. Thomson: Well, I am mindful of the rule that hearsay is sometimes very strong evidence itself and is admissible unless objected to. I wouldn't have the slightest fear about the record in case it was considered by your Honor.

The Court: Very well, for the purpose of the record indicate the purpose of the offer of this document.

Mr. Thomson: I have made no offer of the document. The witness, though, referred to this document and did so without objection, as an expert witness.

(Testimony of George D. Burr.)

The evidence was completely brought out by the attorney [320] for the plaintiff in this case about these Army planes and their weights. Here, for example, is something from the Army confirming their theories of the weights of planes—of their own planes. From that standpoint it is pertinent, your Honor.

The mere fact that it is hearsay doesn't deprive it of any relevant force. Courts have continually held that hearsay received without objection can be considered by the Court. And I consider this the strongest character of evidence, even though it is hearsay, because it emanates from an official Government report on this very subject.

The Court: Well, let's have the record clear on the purpose of the offer.

Mr. Thomson: The witness referred to this document in review of what the Federal authorities had ruled upon in a report, and in confirmation of this witness' own program in design of the Airport. From that standpoint I think it is extremely relevant. The document went on further to draw an engineering distinction, which is also drawn by this witness and by Mr. Messersmith, as to the strain upon the Airport of regular scheduled operations and spasmodic or infrequent operations. That is in there very definitely, in the report, and in confirmation of this witness' own engineering opinion.

The Court: We can agree on the fact that this witness is an expert? [321]

Mr. Dyer: Yes, sir, I will agree that this wit-

(Testimony of George D. Burr.)

ness is a registered professional engineer and that he has had the experience testified to by him at the San Francisco Airport.

May I point this out to your Honor, that this was oral testimony and he was referring at times directly and at times inferentially to a report that he was holding in his hand. As counsel points out, at no time was this report as a document offered in evidence. Thus, there wasn't any opportunity afforded counsel for the plaintiff to cross-examine this man on the source of the information on which he was testifying at the time, and we were not able to take him on voir dire. And this, in connection with the understanding that the general objections we had made theretofore went to all this testimony. I think it deprived us of an opportunity until we took him on formal examination to inquire into the content and matter of the source of this information testified to by him and thus have an opportunity to get into the objection of hearsay.

It would thus seem at this time, your Honor, a motion to strike on that ground is most appropriate.

Mr. Thomson: If your Honor please——

The Court: Just a moment. I am prepared to rule.

Mr. Thomson: Excuse me.

The Court: You can submit your motion. I will not pass on it at this time if you wish to make up a record, if that is agreeable. [322]

Mr. Dyer: I don't understand your Honor.

The Court: You can submit your motion and I



(Testimony of George D. Burr.)

shall not act on it until the record is made up, so that you may save any legal point, if it has any merit, and I will not pass on it at this time.

Mr. Dyer: Thank you, your Honor.

Mr. Thomson: If your Honor would permit me, I don't wish to unduly prolong this argument, but I do want to respond to something counsel said, if your Honor will indulge me.

The Court: Yes?

Mr. Thomson: Counsel used the phrase "general objection". I know of no such phrase in the law of evidence. His objections must be specific. There is no such thing as a general objection, and no specific objection was ever made that this was hearsay.

It was quite evident to everyone that the witness was reading from a document. There was an opportunity to take him over then and there if counsel wanted to, to find out what he was reading from.

Mr. Dyer: Your Honor, I think I have made my objection on specific grounds, and I don't think it would be of benefit to counsel or the Court to go into it at this time.

The Court: I had my mind fixed on it myself. I am satisfied the record does not disclose you made an objection to the document or to the contents. I could stand corrected [323] on that, don't misunderstand me. However, the record is being made up and you will have an opportunity to point out what the record discloses.

Mr. Dyer: Yes, sir.

Mr. Dyer: Q. Mr. Burr, I take it in the light



(Testimony of George D. Burr.)

of the information contained, obtained from the various airplane companies, you had knowledge that planes in excess of 25,000 gross take-off were in process of manufacture in 1940, 1944, 1942?

A. Yes, they were in the process of manufacture in 1940 and 1942.

Q. They were 4-engine planes, were they not, sir? A. Yes.

Q. Now, I notice that you referred to certain information concerning the number of bombers that used the Airport during the war years. Did that information also include the number of military cargo planes and military transport planes that used the Airport?

A. As I previously testified, the document I was reading from was not in my hand at that time. It was given to us by Dr. Robert Hornonjeff of the Army Engineer's Office in 1947.

Q. I see. But did that data which you referred to include any reference to the number of cargo planes and the number of military transport planes which utilized the Airport during [324] the war period?

A. The document recited that heavy cargo planes and transports were incorporated in the number of bombers as I read it. Heavy bombers and transport as one figure.

Q. Does it include the transport planes, the four-engine Transpacific transport planes which were operated by United Airlines for the United States Government during the war years?

(Testimony of George D. Burr.)

A. It does not specifically say whether it does or does not. It says that was the traffic at that weight category, 30,000 to 65,000 pounds.

Q. Are you familiar with the statement—I believe it was in the 1942-1943 report of the Commission—that during the war 1,350 Transpacific flights were made from the San Francisco Airport by United transport planes?

A. I am familiar with the statement. Yes, I have read it.

Q. In 1940, Mr. Burr, do you have any recollection of the number of arrivals and departures daily from the San Francisco Airport by United Airline planes?

A. I would have to refresh my memory.

Q. Yes, sir, I would be glad to do that.

The Court: Take a recess for a few moments.

(Short recess.) [325]

Mr. Dyer: Q. Mr. Burr, we were discussing the number of arrivals and the number of departures in 1940-41 by United Air Lines planes. I wonder if you would read into the record from the 1940-41 report of the San Francisco Public Utilities Commission this sentence on page 215 of that report which I indicate to you, please.

A. The sentence you requested be read is on page 215 of the 1940-41 report of the Public Utilities Commission of San Francisco, under the heading "Transport traffic, San Francisco Airport."

"The schedule of United Air Lines at San Francisco Airport Number 37 arrivals and 37 departures

(Testimony of George D. Burr.)

daily; service is provided north to Vancouver, south to San Diego, and east to New York and Philadelphia via the mid-Continent route."

Q. Had you concluded, sir?

A. That is the entire sentence.

Q. Now, Mr. Burr, according to your knowledge and recollection, was United at that time the most frequent user of the Airport?

A. The data on flight operation is maintained under the direction of Mr. Messersmith, Superintendent of Airport Operations. The data I would receive would be received from him.

Q. I am asking for whatever information you may have. Do you have any information as to whether or not United at that [326] time was the most frequent user of the Airport?

A. Among the transport airlines, yes.

Q. And has it so continued since 1940 and '41 as the most frequent user of the airport to your knowledge?

A. Yes, they have been the most frequent transport airline—scheduled transport airline.

Q. And they, along with all the other airlines, utilize all the areas of the Airport, do they not—the runways, aids, taxi-ways?

A. The area in common use is in fact used in common among the airlines.

Q. Isn't it a fact that United and other airlines have in operation at the present time rather heavy planes such as the Boeing Stratocruiser at the San Francisco Airport?

(Testimony of George D. Burr.)

A. The present date is 1953, and the statement you have made is correct of that date.

Q. I wonder if you would give us your estimate of the approximate take-off weight of the Boeing Stratocruiser?

A. Approximately 143,000 gross weight.

Q. Is that plane utilized at San Francisco Airport by TWA?

A. No, it doesn't use the apron in question, never has. It has failed. The apron you are speaking of is in the International Airport and it failed from the weight of that plane and had to be replaced at the cost of over a hundred thousand dollars. [327]

Q. To get specifically to the question I put, that plane, the Boeing Stratocruiser, is not utilized by TWA at the San Francisco Airport?

A. No, it is not.

Q. What was your answer?

A. It is not in this Airport.

Q. Mr. Burr, I refer you to the report of 1944 of the U.S. Engineers Office which you referred to on your direct examination. I notice thereon that there is a notation under the column of heavy bombers and heavy transports, 30,000 to 65,000 pounds, of average daily landings and take-offs of 14: is that correct? Would you check me on that, sir?

A. It says, concurrently in 1944—the date is 14 July 1944; I take that to be the intent.

Q. Would you be good enough, Mr. Burr, to read the paragraph under these columns to which I have just referred.

(Testimony of George D. Burr.)

A. Yes, the note referred to reads, "The latest figures on heavy planes are the most important. These figures show that on an average day there is a landing or take-off every four minutes of the entire 24-hour period. The number of heavy planes and their weights probably will increase during the next few years." This is dated 1944, corrected 1945.

Q. And am I correct in my understanding that the reference to heavy planes is a reference to military planes? [328]

A. Not necessarily; those in the category of 30,000 to 65,000 pounds.

Q. So that this note states that the number of those planes within the description stated by you there that it is probable will increase during the next few years?

A. That was the opinion in 1944 and '45, but not in 1942.

Q. Mr. Burr, are you familiar with a document, a trade publication entitled "American Aviation"?

A. I have seen the magazine.

Q. Do you know whether or not that publication has been made available to various representatives of the San Francisco Airport during the period 1940 to the present?

Mr. Thomson: With your Honor's permission, I should like to instruct the witness to answer either yes or no to that question.

The Court: You may answer either yes or no.

A. Your question was: To my knowledge has it been?



(Testimony of George D. Burr.)

Mr. Dyer: Yes.

A. The answer is to my knowledge, no, during the whole period. I do not have knowledge of the whole period.

Mr. Thomson: Just a moment, Mr. Burr. You were asked to answer the question either yes or no.

Mr. Dyer: Q. Mr. Burr, when did you first obtain any notice of the existence of the Constellation type plane?

A. To the best of my recollection about 1943.

Q. When did you first hear that it was being planned? A. About 1943.

Q. Did you construct any documents concerning that plane about that time? Did you draw any documents concerning the characteristics of that plane?

A. I did not draw any documents at that time, no.

Q. Did you make any computations concerning that plane about that time? A. No.

Q. Did you regularly receive information from CAA concerning the types and weights of planes scheduled to come into use?

A. I received information from time to time, but I wouldn't say regularly.

Q. And did you receive it from time to time in 1940 and '41 and before you were in the service of the Government?

A. We received current information, but not necessarily all of it. It isn't automatically mailed by them. It is obtained by conference, by receiving

(Testimony of George D. Burr.)

publication lists, sending for them, and some similar manner.

Q. And among the information that you received from time to time from CAA did you receive airport design information?

A. I don't recall specifically, but perhaps we did. I wouldn't say we didn't.

Mr. Dyer: That is all.

The Court: Step down.

(Witness excused.) [330]

Mr. Thomson: Mr. Dixon.

### GEORGE M. DIXON

was called as a witness on behalf of the defendants, sworn.

The Court: Your full name?

The Witness: George Martin Dixon.

The Court: Where do you live, please?

The Witness: 1017 Vallejo Street, San Francisco.

The Court: Your business or occupation?

The Witness: I am manager and chief engineer of the San Francisco Airport Department.

The Court: Proceed.

### Direct Examination

Mr. Thomson: Q. Mr. Dixon, are you a graduate of any university? A. No, I am not.

Q. Did you attend any university?

A. Yes, I did.

Q. Where?

(Testimony of George M. Dixon.)

A. University of California.

Q. For what period of time?

A. Four years.

Q. Did you subsequently graduate from any other institution?

A. I graduated from the Naval Air School at Pensacola, [331] Florida in 1928 and took the professional examination and was commissioned in the United States Navy.

Q. When did you enter the United States Navy?

A. The latter part of 1928 as a reserve officer.

Q. When did your activity in the aviation field commence?

A. Well, the first experience I had in aviation was attending an air show in 1911 in Shellmound Park in Emeryville. Subsequently I had a flight in 1917 at Santa Monica. I had some training at North Island in 1925, and I received my basic training at Pensacola, Florida, in 1928.

The Court: I used to be a patron of Shellmound Park. What occurred at that time with relation to aviation?

The Witness: In 1911—I believe it was '11—

The Court: What happened there?

The Witness: In 1911 at Shellmound Park?

The Court: Yes.

The Witness: They had several aircraft driven by small-type engines with bicycle chains going out to the wooden propellers, and I don't recall of any one clearing the fence; they were taking off inside of that racetrack, if I recall correctly.

(Testimony of George M. Dixon.)

The Court: That is the only reason I asked. Thank you. Proceed.

Mr. Dyer: Stipulated he has great experience.

The Court: Those were the good old days. It is hard for [332] you young fellows to understand them.

Mr. Thomson: Q. Have you a present commission in the United States Navy?

A. I am a Captain in the United States Naval Reserve and Commanding Officer of Wing No. 87 located on the Oakland Airport.

Q. About how many hours of flying have you experienced?

A. Approximately 6,000 in multi and single-engine land planes and sea planes.

Q. Have you a license as an aviator of this State?

A. I am a designated naval aviator as of this date classified 1315. [333]

Q. Now, during World War II did you have any experience in the United States Navy?

A. Yes, sir. I was ordered into the Navy on December 2nd, 1940, and I was released on February 28, 1946. During that period I was the flight instructor, Public Works Officer when they built the Naval Station at Oakland, Livermore; Superintendent of Aviation Training, where I lectured on several subjects. I was then Executive Officer of the Naval Station at Leyte. Commanding Officer of the Naval Air Station at Newfoundland.

Q. During these times that you have described

(Testimony of George M. Dixon.)

did you have anything to do with construction work?

A. Yes. During the construction of the hangars and facilities at the Naval Air Station in Oakland I was Public Works Officer. When we constructed the base in Livermore I was the Officer in Charge.

Q. Did you have any duty in the South Pacific with reference to construction?

A. In the South Pacific I was Officer in Charge of Logistics on the staff of Admiral Frank Wagner. It was our responsibility to develop bases, assign aircraft, materiel and personnel to various fleet units.

Q. Have you had any business experience?

A. I was with the Tidewater Associated Oil Company from [334] 1929 up until the time I went to the City and County of San Francisco on April 3rd, 1950, other than my tour in the Navy during World War II.

Q. What were your duties with the Tidewater Associated Oil Company?

A. I started out as a salesman in Oakland. I later became their Chief Pilot, flying on the Pacific Coast as far back as Chicago at times. I was then made sales agent or manager of the Oakland Division. I was then made sales agent or manager of the San Francisco Division.

Q. Well, in what field were those sales agencies?

A. Well, I was responsible for the sales of petroleum products, delivery of petroleum products, in the East Bay Area, which went from Hayward to Pinole, and to the lower level tunnel. It was neces-



(Testimony of George M. Dixon.)

sary to lecture occasionally on petroleum products. I had considerable work with Hall Scott Motors as to the application of petroleum products, petroleum product periods, and internal combustion engines.

Q. Did you have anything to do with the sale of aviation fuel while with the Tidewater Associated Oil Company?

A. Yes, I did. I had—— At one time as Manager of the Aviation Department I contacted airports throughout the Pacific Coast selling aviation products, including gasoline.

Q. Mr. Dixon, have you studied further development of the San Francisco Airport? [335]

Mr. Dyer: I object to that on the ground it is incompetent, irrelevant and immaterial what the projected plans of the San Francisco Airport may be. Certainly that can have no bearing on the issues in this case.

Mr. Thomson: As I suggested to your Honor, I think I am speaking accurately when I say to your Honor that you are not only concerned with the past, you are concerned with the future. And I am going to demonstrate through this witness that these problems with reference to development of the Airport that have already been partially solved still remain as problems, and that the TWA is before your Honor claiming that throughout the future life of this lease nothing will be done or nothing should be done except imposition of ridiculous and absurd charges of \$4.25 for take-offs, an item of that sort that has already come into evidence.

(Testimony of George M. Dixon.)

I think it is quite important in order that your Honor have a full picture that we prognosticate as far as *we able* as to the future.

Mr. Dyer: Your Honor, I don't wish to engage in argument with counsel at this time. Certainly I would take issue with him, if this were the time for argument, that these charges are ridiculous and absurd charges.

Be that as it may, we are here in judicial proceeding presenting certain issues to the Court. The Court, I believe, [336] is concerned with what has occurred in the past. It will make its determination on the record in this case, from the facts that have occurred thus far.

I don't believe anything that the Airport proposes to do in the future should be binding on TWA or should be considered by this Court. I think we have the facts before us. It is perfectly competent to testify to pertinent facts as they have occurred, but I don't believe predictions should be considered in this case.

The Court: Matter submitted?

Mr. Dyer: Yes.

Mr. Thomson: Yes, your Honor.

The Court: The objection will be overruled. I will allow the testimony, subject to your motion to strike and over your objection.

Mr. Thomson: Q. Have you the question in mind, Mr. Dixon? A. I believe so.

Mr. Dyer: If the Court please, I would like the record to show I object to this question on the

(Testimony of George M. Dixon.)

ground that it is incompetent, irrelevant and immaterial. I am not sure I have made that objection at the time of the argument.

The Court: Let the record so show. Do you wish the question read?

The Witness: I believe I recall the question.

The Court: Very well.

A. During the past several years, why, it has become necessary to study the flight pattern of aircraft as the flight pattern pertains to operations in and out of any airport, particularly after the several fatal accidents they had in the East.

There is a national board that was established just recently by all of the major airlines, headed by former Admiral Rosendahl, that is making a study of the air pattern throughout the United States.

We desire to have an air pattern at the San Francisco International Airport that will cause aircraft to land, approaching over Bay water, avoiding congested areas where you have homes or congregations of people. And on the take-off we desire to have a flight pattern that will cause aircraft to avoid going over homes, populated areas and congested areas.

Based on the trend in aviation as a result of the development and research carried on in the past with reference to developing horsepower engines, they seem to be developing heavier, larger and faster aircraft. When you have aircraft with heavier weights, they are increasing the wing loading of the airplanes, it becomes necessary to adjust

(Testimony of George M. Dixon.)

your pattern accordingly. Wing loading has increased considerably during the past. [338]

We realize that the trend in aviation, jet aircraft, and so forth—we have been approached on that subject—in order to protect the future, protect our interests, we now feel we should acquire on purchase properties into the Bay waters further than where we own at the present time. That is, on easterly and southeasterly.

At the present time we own some approximately 3600 acres. We have around 2200 acres above water. We contemplate purchasing another six or seven hundred acres so we can protect that flight pattern. If it becomes necessary though the development of aircraft of larger and heavier types, we then will have the property where we can expand in an easterly or a southerly direction, which will effect safe and economical operations.

I say economical operations because aircraft are very expensive to operate. The Super-Con you are speaking about costs about \$1,700,000 for one airplane. We base the operating cost of aircraft on hours in the air, from block to block. They are quite expensive to operate.

Mr. Dyer: If Your Honor please, I will move to strike that answer concerning the cost to the airline to operate planes. I do not believe it is responsive, and I do not believe it is relevant to the issues in this case.

The Court: I will allow the record to stand. I



(Testimony of George M. Dixon.)

am learning something about aviation every minute here. All right. [339]

A. We have taken the stand that by having the proper type of runway, meaning of sufficient length, width and load-bearing characteristics, it offers safety from the standpoint of operations. And by having dual runways, it will effect economy because aircraft are not delayed on approach at the airport or not delayed materially when they take off.

We have in mind possibly one of the greatest airports in the world. So I say that the future of aircraft design will determine what we are to do. At the present time we are endeavoring to purchase property out in the Bay areas, in addition to what we now own, to protect our interests, and to have an airport which is the gateway to the Pacific.

The San Francisco Airport is approximately a little over one hundred miles closer to Honolulu than Los Angeles or Seattle. That is 200 miles round trip. So we will always be strategic-wise a very important airport. Military-wise we will be very important.

Mr. Thomson: Q. Mr. Dixon, has any consideration been given by you to the future installation of jet planes by aircraft companies?

A. Yes.

Mr. Dyer: I object to this, if Your Honor please. There isn't any foundation laid to show that that question is at all relevant to TWA. I think it is entirely irrelevant.

Mr. Thomson: Counsel could have made the same



(Testimony of George M. Dixon.)

objection [340] years ago with reference to the Constellation, I suppose.

Mr. Dyer: Whatever the argument may be, Your Honor, I will submit the objection.

The Court: Well, it may be helpful, after all. Did you gentlemen indicate to the Judge as to how long this case would take? Did you go on the record as to the time?

Mr. Dyer: Four days, as I recall.

The Court: Are we within that period?

Mr. Dyer: Yes, I believe we have one more day under the schedule.

The Court: I will allow it. Objection is overruled. Proceed.

A. About a year and a half ago a Sir Leonard Isatt—I-s-a-t-t—I believe that is the name—representing BCPA (British Commonwealth Pacific Airways) from New Zealand spoke to me in my office and indicated——

Mr. Dyer: Just a moment. If Your Honor please, I object to this testimony on the ground that it is hearsay.

Mr. Thomson: Q. Just describe in a general way, Mr. Dixon, without referring to the particular people you talked to.

The Court: You see, any conversation you had at that time, there were none of these people represented and they are not bound by any conversation you had there.

A. I see. [341]

Mr. Thomson: Q. Just tell us, if you will, Mr. Dixon, in a general way what consideration you

(Testimony of George M. Dixon.)

have given to the jet plane problem, without reference to any conversations you might have had.

A. Oh, I see. Well, I can't very well explain my thinking unless I refer to the conversation I had with the individual concerned with our jet aircraft.

Mr. Dyer: If Your Honor please, I will object to any evidence or any knowledge of this man based on conversations with somebody else.

Mr. Thomson: Q. Well, if you can't answer——

A. (Interposing) Well, I will answer it this way——

Mr. Dyer: (interposing) Further object on the ground it is an opinion and conclusion.

The Court: Give him an opportunity.

A. This particular airline through BCPA have purchased jet aircraft.

Mr. Dyer: Your Honor please, I move to strike all this on the ground that it is entirely irrelevant, not binding on TWA.

Mr. Thomson: I will withdraw the question and put another question.

Mr. Thomson: Q. Have you in a general way considered the problems created by the advent of jet planes?

A. Yes, based on the knowledge that we have gained to date, [342] it appears that some day in the future we will have jet aircraft.

Q. What would be required in the way of additional facilities in the event of the operation of jet planes by commercial aircraft?

Mr. Dyer: I object to that upon the ground that

(Testimony of George M. Dixon.)

no foundation has been laid to show that this refers to any operation by TWA now or in the future.

Mr. Thomson: I will withdraw the question.

Mr. Thomson: Q. Do you consider there is a possibility that airlines in the future will ultimately adopt the use of jet planes?

Mr. Dyer: I object to that on the ground it calls for an opinion and conclusion, and by the very form of the question calls for a speculative answer.

Mr. Thomson: Why can't we have an opinion and conclusion from an expert witness?

Mr. Dyer: That is pure speculation.

Mr. Thomson: Well, I think all experts speculate to some extent.

The Court: In the interest of time I will allow him to answer the question so we can go on.

A. Why, the Boeing factory in Seattle and the Douglas factory in Los Angeles are both constructing jet aircraft which they expect to be used by airlines. [343]

Mr. Thomson: Q. And what are the problems created at an airport in the event of the installation of jet planes?

Mr. Dyer: Your Honor please, I do not wish to be captious, and I do not wish to delay these proceedings. May it be deemed I am objecting to these questions on the ground that they are calling for opinion and conclusion on a matter of hearsay?

The Court: Well, they are in the realm of speculation, but with the hope that this is the last question I will allow the answer.

(Testimony of George M. Dixon.)

A. Well, actually there probably will be many problems that we will be required to solve. Apparently there is a terrific noise given off by jet aircraft. There are certain problems that we or the Government do not have the answer on concerning the type of pavement or the damage that is caused by jet aircraft operating on runways or taxi-ways.

The Court: That is the reason it is speculative. We are wasting our time.

Mr. Thomson: Yes, Your Honor. I will go to another subject.

Mr. Thomson: Q. Mr. Dixon, will you tell His Honor of the problems involved in the increased weights of aircraft from the standpoint of the manufacturer?

Mr. Dyer: Just a moment. I will object to that. There isn't any evidence that that should be binding on TWA. TWA [344] doesn't manufacture airplanes. There is no showing that is the fact.

Mr. Thomson: This will have a bearing, Your Honor, upon the question as to whether or not the advent of the heavy planes should be anticipated. I will demonstrate by this witness that it is necessary that inventions should have been made in the way of lighter materials, that inventions should have been made of new type of engines developing very high horsepower unknown before; that invention had to be made in new types of fuel by which these planes could be operated. They were all related problems, and if those problems as a whole had not been solved we would not have even today



(Testimony of George M. Dixon.)

planes of 100,000 pounds. I think it has bearing upon the subject.

Mr. Dyer: Your Honor, that is not binding on TWA. We are not in the airplane manufacturing business. Moreover, if we go into these many collateral questions——

The Court: For the limited purpose, counsel indicated, I will allow the testimony.

Mr. Thomson: Will you read the question, please, Mr. Reporter, with the Court's permission?

Mr. Dyer: May the record show I am objecting to it on the ground that it is incompetent, irrelevant and immaterial?

The Court: Yes, let the record so show. [345]

(Thereupon the Reporter read: "Question: Mr. Dixon, will you tell His Honor of the problems involved in the increased weights of aircraft from the standpoint of the manufacturer?")

A. The airplane designers determine the available horsepower available; the aircraft is then designed around the horsepower. During the past 20, 25 years, the engines have come from the Wright J-5, which is around 225 horsepower, to the Wright engine which is 3,000 horsepower or better. The 28 Cylinder Ross was over 3,000 horsepower.

That has happened over the years, as the result of the research and engineering developed by the oil companies developing gasolines with higher octane fuels that would burn smoothly in a combustion chamber.

During that period the metallurgists have devel-



(Testimony of George M. Dixon.)

oped various types of metal that stood these temperatures and pressures, and it has been possible to develop highpowered engines today and to develop the propellers which must carry that particular load.

The result of the power plant we have today has been something that was not anticipated 10, 15 years ago. As I said, we are from——

Mr. Dyer: (interposing) Just a moment. I move to strike that statement on the ground that it is voluntary and is purely an opinion and conclusion as to what was or was not [346] anticipated.

Mr. Thomson: An expert witness, if Your Honor please, is entitled to testify to his opinion and conclusion.

Mr. Dyer: I don't believe this witness has been qualified as an expert in manufacture of airplanes. He has been qualified as a man with a lot of experience in the operation of planes.

The Court: I think it goes to the weight of the testimony and I will allow it over your objection. Proceed.

Mr. Thomson: Mr. Reporter, will you read back a few words so that the witness can pick up the context?

(Thereupon the Reporter read: "The result of the power plant we have today has been something that was not anticipated 10, 15 years ago. As I said we are from——")

A. Well, through the stimulus of the inventive genius of man and attainments of mechanical agen-

(Testimony of George M. Dixon.)

cies, they made it possible to come out with engines of horsepower ratings over the past 25 years from 225 to as high as 3200, I believe, on the Wright Compound, and up as high as 3100 for one engine. That has made it possible for the designer to build heavier, larger and faster aircraft.

Mr. Thomson: You may take the witness.

The Court: It is now 4 o'clock. Probably you want to go back and make some preparation, and we will save time by adjourning now, or do you wish to conclude with this witness? [347]

Mr. Dyer: I believe we will save time, considerable time, if we conclude it now for today.

The Court: Proceed, if you wish.

Mr. Dyer: No, I said I believe we will save time if we will conclude for the day at this time.

The Court: We will take an adjournment until tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken to the hour of 10 o'clock a.m. Friday, September 11, 1953.) [348]

The Clerk: Trans World Airlines, Incorporated vs. City and County of San Francisco, further trial.

GEORGE M. DIXON

called as a witness on behalf of the defendants, resumed the stand, previously sworn.

Mr. Dyer: If the Court please. I have no questions to put to Mr. Dixon.

Mr. Thomson: I beg your pardon?

(Testimony of George M. Dixon.)

Mr. Dyer: I have no questions to put to Mr. Dixon.

Mr. Thomson: That is all. Mr. Dixon, will you step down, please.

(Witness excused.)

Mr. Thomson: Mr. Messersmith.

### HAROLD MESSERSMITH

was recalled as a witness on behalf of the defendants, resumed the witness stand, previously sworn.

The Clerk: Harold Messersmith to the stand, heretofore sworn.

### Direct Examination

Mr. Thomson: Q. Mr. Messersmith, you were asked by Mr. Dyer as to whether or not the bidding was by way of competitive [349] bid in the transaction of October 1942 as to TWA. I want to ask you further in that connection what the element of competition in the bid was?

Mr. Dyer: I will object to that upon the ground that it is incompetent, irrelevant and immaterial. The fact is there were bids and that was the legal procedure called for by the City.

Mr. Thomson: I think this is in response to counsel's interrogation on that subject. It is rather deceptive if you simply stop with the statement that it was a competitive bid. I will demonstrate by this witness——

The Court: You may develop the facts, whatever they are. The objection will be overruled.

(Testimony of Harold Messersmith.)

Mr. Thomson: Q. Will you state what the element of competition was in the bidding?

A. The biddable item was Hangar No. 4. That is a hangar that cost approximately \$50,000. The City had the hangar constructed with its funds.

Q. And the bidding was limited to occupancy of Hangar No. 4? A. Yes.

Q. Were these various provisions incorporated in this document for common use facilities involved in the bidding? A. No.

Mr. Thomson: You may take the witness. [350]

#### Cross Examination

Mr. Dyer: Q. The City did call for bids for that property, did it not?

A. Yes, for the exclusive use of Hangar No. 4.

Q. And it advertised for those bids, did it not?

A. Yes.

The Court: Pardon me; what is the question?

Mr. Dyer: And it advertised for those bids, did it not? A. Yes.

Mr. Dyer: Q. Similarly, had it advertised for bids in the other leases executed about that time with airlines?

A. One other lease at that time—about that time.

Q. Now, Mr. Messersmith, I am going to show you this document attached to the lease of October 1, 1942, which is a resolution of the Board of Supervisors of the City and County of San Francisco approved November 3, 1942 and entitled "Res-

(Testimony of Harold Messersmith.)

olution confirming lease of certain property at the San Francisco Airport to Trans Continental & Western Air, Resolution No. 2966." Would you please read the "whereas" paragraph of that resolution?

A. "Whereas, pursuant to Ordinance No. 1736, Series of 1939, the Director of Property advertised in the official newspaper that bids or offers would be received by him on September 4, 1942, for leasing certain city-owned land at the San Francisco [351] Airport together with certain airport privileges and facilities. Said land is situated in the County of San Mateo, State of California, and is more particularly described as follows:"

Now the description is quite lengthy and it refers exclusively to the Hangar No. 4 which I just mentioned.

Q. That refers to land and facilities, does it not? Have you finished with it?

A. It states "for leasing certain city-owned land at the San Francisco Airport comma together with certain airport privileges and facilities."

Q. Yes. And that was the resolution of the Board of Directors confirming the 1942 lease?

Mr. Thomson: You mean the Board of Supervisors.

Mr. Dyer: Board of Supervisors; pardon me, we are dealing with a municipal corporation.

If the Court please, Mr. Thomson has agreed to stipulate to the validity of a photostatic copy of an advertisement for bids for the leasing of certain



(Testimony of Harold Messersmith.)

lands at the San Francisco Airport with reference to this lease. I have before me this photostatic document which is entitled "Authorizing Director of Property to solicit bids for leasing of certain lands at the San Francisco Airport, San Mateo County, No. 775, Ordinance No. blank, Series of 1939."

I wish to read into the record this sentence which [352] appears in the advertisement:

"Together with the rights and privileges of using the facilities of the San Francisco Airport for the operation of aircraft."

Mr. Thomson: Is there a reference in the call for bids "pursuant to the terms of a certain lease"? That has been our practice.

Mr. Dyer: This is a document which is attached to a letter received from the office of the Controller of the City and County of San Francisco and directed to Mr. John O'Toole, City Attorney, dated December 3, 1940.

Mr. Thomson: I didn't ask you that; pardon me.

Mr. Dyer: I was getting to that.

Mr. Thomson: It has been the usual practice in the call for bids to refer to a certain proposed lease available for inspection by the respective bidders.

Mr. Dyer: Your Honor, I think I should state at this time that I do not wish to mislead the Court. I was under the impression that this advertisement that I was referring to referred to the TWA lease. I see here that this is a reference to the United

(Testimony of Harold Messersmith.)

Air Lines lease; but that is only the last quotation I read to the Court, and the quotation that I first read there was from the resolution that also refers specifically to the TWA.

Mr. Thomson: Let's start in again on this TWA lease. [353] Do you want to offer the resolution of the Board of Supervisors?

Mr. Dyer: I will offer the resolution of the Board of Supervisors in evidence, sir. It is attached to the lease which is attached as a document as an exhibit to our complaint.

Mr. Thomson: It is part of the exhibit to the complaint, yes.

Mr. Dyer: May it be deemed admitted, counsel?

Mr. Thomson: That is correct; I will so stipulate; it may be deemed admitted in evidence.

Mr. Dyer: Q. It is correct, is it not, Mr. Messersmith, that in the lease with reference to the United that there was a specific advertisement for the leasing of land and facilities, isn't that so, to the best of your knowledge and recollection?

Mr. Thomson: This relates now to what the call for bids says.

Mr. Dyer: All right.

Mr. Thomson: Have you the call for bids on the TWA lease?

Mr. Dyer: I am quite certain, Mr. Thomson, that the call for bids is contained in the TWA files. I do not have it in court.

Mr. Thomson: I wonder if, subject to future correction, you could for the time being stipulate

(Testimony of Harold Messersmith.)

that the call for bids [354] for the lease that ultimately was awarded to TWA contained a reference to a proposed lease? That has been our practice. I surmise, subject to correction, that there was a reference in the call for bids to a proposed lease. I think we could enter into that stipulation now and check the records and correct it if necessary at a later time.

Mr. Dyer: I can't stipulate, Mr. Thomson, because I do not recall examining that document. I have no present recollection whatever.

Mr. Thomson: If this trial continues much further I may have the opportunity to get the Director of Property Available and get the copy of the call for bids.

The Court: Q. Are you familiar with the lease they were discussing? A. Yes, I am.

Q. Are you prepared to say what the language is, if you know?

Mr. Thomson: His Honor refers, Mr. Messersmith, to what I just mentioned: the calls for bids.

The Court: Q. The call for bids.

A. To my recollection the biddable item was the amount to be paid on the hangar premises.

Mr. Thomson: Q. To your best recollection did the call for bids so indicate?

A. To my recollection it did.

Mr. Dyer: Q. And the resolution of the Board of [355] Supervisors confirming the lease and authorizing the lease specifically referred to the facilities as read by you, is that correct?

(Testimony of Harold Messersmith.)

A. Yes, it included the schedule of rates that were in effect at that time.

Mr. Thomson: Q. Is it your recollection, Mr. Messersmith, that a lease was in the first instance prepared and that the call for bids upon this proposed lease, already prepared, mentioned the proposed lease, and the proposed lease as drawn, before any bids were received, enumerated these various items and charges for common use facilities?

A. Yes.

Mr. Thomson: I think that is sufficient.

Mr. Dyer: Yes; I am content to stand on the resolution of the Board.

Mr. Thomson: I am content to stand on this call for bids and the language for leasing property.

Q. The biddable item solely was the rental for the hangar space; that was all that was bid on?

A. Yes.

The Court: I think it is important. If there is any question about it, you had better clear it up.

Mr. Dyer: I can say this, Your Honor: That I have initiated an attempt to discover that document, the cost of bids, and if I receive it, I will make such information as may be there available to the Court.

Mr. Thomson: I will send over for it now, Your Honor, if we may have some time.

The Court: Very well.

Mr. Thomson: That is all I have, Mr. Messersmith. Have you finished with your cross examination?

Mr. Dyer: Yes.



(Testimony of Harold Messersmith.)

Mr. Thomson: That is all, Mr. Messersmith.

(Witness excused.)

The defendants and cross-complainants rest, if Your Honor please.

The Defendants Rested.

Mr. Dyer: I will call Mr. Andrews.

### HENRY G. ANDREWS

called as a witness for the plaintiff and cross-defendant in rebuttal, previously sworn.

The Clerk: Henry G. Andrews to the stand; heretofore sworn.

The Court: You have already been sworn.

Mr. Thomson: If the Court please, for the purpose of [357] simplification of the record, I move to strike the testimony relating to the United lease that counsel inadvertently presented.

The Court: It may go out.

### Direct Examination

Mr. Dyer: If the Court please, at page 186 of the record, the Public Utilities Annual Report, that is the report of the San Francisco Public Utilities Commission, for the fiscal year 1936-1937 was identified by Mr. Messersmith. At this time I should like that document to be identified, marked for identification, and the portion thereof extending from page 155 to page 182 be received in evidence.

Mr. Thomson: Are you waiting for me to say something?



(Testimony of Henry G. Andrews.)

The Court: He is offering this in evidence and I do not know what it is.

Mr. Thomson: May I see it briefly?

Mr. Dyer: It is the '36-'37 report of the Public Utilities Commission.

Mr. Thomson: This was previously marked for identification. You have made your offer. I have no comment. I never stipulate to anything going into evidence; it isn't my practice.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 19 marked for identification,— [358]

The Court: So the record is clear on this in the transcript, summarize that and in some way identify it.

Mr. Dyer: Yes, sir. On page 186 of the transcript when Mr. Messersmith was on the stand under cross examination, I put to him questions concerning his contemplation of the nature of the weight of planes that would come into use thereafter, and at that time I showed to him a picture of a prototype 4-engined plane with the markings "TWA" on the wing and asked him to identify it, and he said it was a plane that was contemplated to carry, I believe, 33 passengers, and various testimony appears in that regard at that point, about page 186, concerning this exhibit.

The Clerk: And Plaintiff's Exhibit 20 admitted and filed in evidence.

(Testimony of Henry G. Andrews.)

(Thereupon Report for fiscal year 1936-1937 referred to above was marked Plaintiff's Exhibit No. 19 for identification only.)

(Thereupon chapter of report referred to above was marked Plaintiff's Exhibit No. 20 and admitted into evidence.)

Mr. Dyer: Q. Mr. Andrews, with reference to the subject of the weight of planes, have you had occasion to follow during your connection with the air carriers the weight of planes that were coming into use in the aviation business?

A. Yes, sir.

Q. You testified on direct that you were the chief [359] negotiator of the 1942 lease for TWA and that for a period of some time prior to October 1, 1942, you had various discussions with Mr. Doolin, the manager of the Airport?

A. Yes, sir.

Q. Did any of those discussions concern the weight of planes?

A. Most of them discussed the weight of planes in one form or another.

Q. And approximately when did these discussions take place?

A. Well, they were had at various times, from, oh, say the early part of 1938 to the time of the conclusion of the contract.

Q. In 1942? A. 1942.

Q. What type and weights of planes were discussed with Mr. Doolin during that period?

A. We discussed the ones that were then in use.

(Testimony of Henry G. Andrews.)

and those that were in course of construction and their use was a certainty in the very near future, and the prospects of those that would come into use in the course of years to come.

Q. Specifically what weights were mentioned?

A. The basic weights of planes then in use, or rather the general weight, was around 25,200 pounds, which applied to the DC-3; and the Boeing 307 was in course of construction, and which we hoped to put in service within a very short time, had a gross weight of 54,000 pounds. Then the DC-4, which [360] was then being constructed and in its experimental stage, we did have the exact figures on the weights of it, but we surmised they would be 60,000 pounds and better. It afterwards turned out to be 71,800 pounds. We estimated with the growth of planes from the past history up to the time that this lease would terminate in 20 years' time, that they would be in excess of 200,000 pounds or more.

Q. Mr. Andrews, there has been a great deal of discussion concerning the Boeing Stratoliner which was put in use in April of 1945. I show you this picture. What does it purport to represent?

A. That is the Boeing Stratoliner as we named it.

Q. That is the plane we have been talking about?

A. The Boeing 307, to be more exact in the model number.

The Court: That is 1945?

A. Yes, sir.

The Court: What is the weight of that plane?

(Testimony of Henry G. Andrews.)

A. The plane is 54,000 pounds as used in commercial service. It exceeded that in military service.

Mr. Dyer: May this be marked and received in evidence?

The Court: Let it be admitted in evidence.

The Clerk: Plaintiff's Exhibit 21 admitted and filed in evidence.

(Whereupon photograph referred to above was marked Plaintiff's Exhibit No. 21 and admitted into evidence.) [361]

The Court: Q. Is that a passenger plane?

A. Yes, sir.

Q. It carried freight as well?

A. Not to any great extent. They were for freight planes during the war. The Army took them over from us at the start of the war and they were used to ferry personnel over there. It was one of those that carried President Roosevelt across the ocean on his first trip over there.

Mr. Dyer: Q. Mr. Andrews, did you discuss that plane with Mr. Doolin prior to the time the lease was executed?

A. You are referring to the Boeing 307?

Q. I am referring to the Boeing Stratoliner; I am entirely unfamiliar with the Boeing number.

A. Yes, sir, that was very thoroughly discussed, and I am sure Mr. Doolin had a ride in it prior to the execution of the lease.

Mr. Thomson: What was that? I didn't hear.

A. I said, it was very thoroughly discussed and

(Testimony of Henry G. Andrews.)

I am sure Mr. Doolin had a ride in the plane prior to the execution of the lease.

Mr. Dyer: Q. Where were the Boeing Stratoliners manufactured, Mr. Andrews?

A. In Seattle.

Q. Do you have any recollection of when the first Boeing Stratoliner landed at the San Francisco Airport? [362]

A. In the first months of 1940.

Q. In other words, the Boeing Stratoliner landed at the San Francisco Airport at least two years before the execution of the lease; is that correct? A. Yes, sir.

Q. How many landed at the San Francisco Airport about that time?

A. There was six of those planes ferried from Seattle to San Francisco for use by TWA. The first one that was ferried down was stopped for short flights for TWA personnel and a few of the Airport employees. Then on several occasions after that within the year 1940 they were brought here for publicity flights carrying various City and Chamber of Commerce officials.

Q. We will return to that, Mr. Andrews.

Did you have anything to do with piloting a Boeing Stratoliner into San Francisco?

A. Yes, sir.

Q. When?

A. That was on June 6th, 1940.

Q. Mr. Andrews, how are you able to so precisely fix that date?



(Testimony of Henry G. Andrews.)

A. With my pilot's logbook.

Q. Will you produce that document?

A. Yes, sir. This is the entry referred to (indicating). [363]

Q. I hand you this document that you have referred to, Mr. Andrews. Will you please explain its content to His Honor and what it purports to show?

A. Each licensed pilot is required to keep a record, a log, of his actual flying time, and it must be certified to and presented for renewal of licenses. This is the log which I kept at that time which covers the period from—outside of the summary at the start—from October, 1934, to December, 1940. The entries show the date of a flight, the type of plane and license number or some identification; the number of engines, kind of engines, where from and where to, and the amount of time consumed on the flight.

Q. Mr. Andrews, you referred to the fact that you piloted a Boeing Stratoliner into the San Francisco Airport on June 6th, 1940. Would you state to His Honor the entries that you have in that Logbook before you concerning that flight and that landing at San Francisco?

A. This book shows that on the 6th of June, 1940, type of plane Boeing 307, NC No. 19909, having four cyclone engines, was flown from Seattle to San Francisco, consumed time: 4 hours and 6 minutes.

The Court: What is the time now?

A. Four hours six minutes.

(Testimony of Henry G. Andrews.)

Mr. Dyer: I will ask that this document be marked for identification and I will also offer it in evidence. [364]

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 22 admitted and filed in evidence.

(Thereupon pilot's logbook referred to above was marked Plaintiff's Exhibit No. 22 and admitted into evidence.)

Mr. Dyer: Q. Mr. Andrews, as I recall, you mentioned Boeing Stratoliners after they passed through San Francisco were brought back here for sightseeing and publicity purposes?

A. Yes, sir.

Q. How many were brought back for that purpose?

A. I have a distinct recollection of twice.

Q. Of two?

A. Of two of them that were brought back on different dates.

Q. On how many days?

A. On two different dates, I have a distinct recollection.

Q. Can you state what year that was to the best of your recollection?

A. It was in 1940.

Q. Will you describe what use was made of the Stratoliners when they landed at San Francisco?—at that time?

A. They took various personalities from the City, Chamber of Commerce, City officials and so

(Testimony of Henry G. Andrews.)

forth for short rides over the Bay Area, taking off and landing from the Airport, probably a dozen such flights on each occasion.

Q. Did you participate in any of those flights?

A. Only from a supervisory capacity in the operation of the flights. I can recall the captains of those two flights if you so desire.

Q. Do you recall the names of the captain?

A. Captain Morehouse and Captain Bryant.

Q. When did the Stratoliners first go into commercial service for TWA? A. In 1940.

Q. Two years before the lease?

A. Yes, sir.

Q. Did you discuss that fact at all with Mr. Doolin? A. Quite frequently.

Q. What was the substance of those conversations?

A. I was asked by him as to when I would permit, how many, and so on, San Francisco to have that service.

Q. Anything else said about that subject?

A. Well, about the desirability of having them fly into San Francisco and that he would like to see the Airport have such service.

Q. With reference to the subject of weight of planes, did you ever discuss the escalation clause in the lease with Mr. Doolin?

A. That was a very thoroughly discussed clause.

Q. What was the subject of those discussions with reference to the weight of planes? [366]

A. I was a little scotch, probably, in the first

(Testimony of Henry G. Andrews.)

negotiations, but I wanted a flat rate per landing regardless of size.

Mr. Thomson: I think, counsel, what the witness is now testifying to is merely repetition of his first testimony. I take it that what you are seeking to elicit from this witness now is some special discussion with reference to weights of planes only. Your question indicated that.

Mr. Dyer: Yes, it was so worded.

Mr. Thomson: The witness is doing nothing now but reiterating his testimony on direct examination.

Mr. Dyer: I don't believe so, sir.

Mr. Thomson: That is all he is talking about at this time.

Mr. Dyer: This is going to the subject of the weight of planes. I thought this merely was preliminary.

Mr. Thomson: I ask that the witness be cautioned to respond to the question which involved the weight of planes. That is the only subject counsel was able to go into by way of rebuttal. This witness has already testified along the same line is now testifying; he is simply repeating his testimony on direct.

Mr. Dyer: May the witness proceed?

The Court: I think you went into it fully. However, I hope you conclude.

Mr. Dyer: Q. All right. You did discuss escalation with reference to weight of planes?

A. Yes, sir. [367]

Q. Now, with reference to the escalation clause



(Testimony of Henry G. Andrews.)

what if anything was said concerning the necessity of that clause to take care of the future weights of planes?

A. Will you make that question just a little bit clearer?

Q. Yes. What if anything was said by you or by Mr. Doolin concerning the necessity of that clause to take care of the contemplated weights of planes?

Mr. Thomson: If your Honor please, I want to renew my objection and reiterate my objection which I previously made during plaintiff's case in chief.

There appears to be a complete written contract between the parties, and your Honor made a ruling subject to motion to strike. I want my objection to be interposed that this violates the parol evidence rule. And will it be permitted by your Honor and understood by counsel that my objection goes to this whole line of testimony?

Mr. Dyer: Your Honor, one of the issues raised by the defendants in this case is that there was no contemplation in the minds of the parties that planes would ever exceed 25,000 gross take-off weight.

The Court: As a matter of law, I am limited to the contract itself, am I not?

Mr. Dyer: Not on this issue, sir.

The Court: I think so. So that I will divulge my state of mind now so that you may know it and take advantage of [368] it if you wish, so that your legal rights are protected.



(Testimony of Henry G. Andrews.)

Mr. Dyer: May I make an offer of proof on that sir?

The Court: You may.

Mr. Dyer: Mr. Andrews would testify in response to questions put to him and to which objection had been made that in 1942 he discussed the fact that Boeing Stratoliners were coming into commercial service; that Mr. Andrews wished that a flat rate for the use of planes be included.

The Court: So the record is clear, we had better have that clause that we are discussing, then.

Mr. Dyer: Yes, sir. I am referring specifically now to the paragraph included on page 6 of the lease of October 1, 1942, the last paragraph on that page.

The Court: Read it.

Mr. Dyer: Which states as follows:

"The foregoing fees shall apply to schedules that shall be flown by aircraft not exceeding 25,500 pounds of standard gross weight. With respect to any scheduled trip departure on which aircraft exceeding 25,500 standard gross weight are scheduled by the lessee to be operated, the monthly fee for that scheduled trip departure shall be increased by \$1.00 for each one thousand pounds of such excess weight. (500 pounds or any major part of one thousand pounds to be counted as [369] if a whole one thousand pounds, and any smaller part to be disregarded.) The excess payment is to be computed on the basis of one aircraft."

This witness would testify that he discussed that

(Testimony of Henry G. Andrews.)

clause with Mr. Doolin, and that this witness, Mr. Andrews, representing TWA, wished a flat rate because he contemplated those planes coming into use; and that Mr. Doolin adverted to the fact that it was contemplated that heavier planes would come into commercial service, and that therefore he wished to put into the lease an escalation provision providing for an excess charge in the event those planes in excess of 25,500 pounds came into commercial service.

May I also state that this offer is made to meet and refute that portion of the answer of defendant appearing on paragraph 2, line 23, of the answer and cross-complaint, and extending to line 29, which states as follows:

“In this connection these defendants further allege that there was not on said date——” referring to October 1st, 1942, “——any conception in the minds of any officers or representatives of either of the parties to said document of purported lease that commercial aircraft would ever within the purported term of said purported lease exceed to any substantial extent said maximum permissible take-off weight.” [370]

The Court: Is that all from this witness?

Mr. Dyer: Sir?

The Court: Is that all from this witness?

Mr. Dyer: No, sir. Your Honor, I take it that the offer of proof was rejected?

The Court: I will sustain the objection.

Mr. Dyer: Q. Mr. Andrews, as I recall your

(Testimony of Henry G. Andrews.)

testimony you were at the San Francisco Airport until December of 1942, is that correct?

A. December 1942, yes, sir.

Q. Yes. Now, what types of military planes and of what weights used the Airport during the time of your tenure at the San Francisco Airport?

A. The actual weights under military status, I can only compare them with the commercial version of those types of planes.

The P-38 was a twin-engine pursuit type of plane which was in general use there by the Military. Also, I believe it was termed the P-51 pursuit plane. There were on several occasions the military version of the DC-4, which is a C-54, I believe, under their classification, landed at the Airport, discharged military personnel at the ramp.

Q. Approximately how heavy a plane was the C-54?

A. As we use it in commercial service, 71,800 pounds.

Q. From your knowledge of the—— [371]

Mr. Thomson: Could that be identified as to year?

Mr. Dyer: Yes.

Mr. Dyer: Q. Will you identify the use of the Airport by the C-54's as to year, Mr. Andrews?

A. 1942.

Q. Yes. From your knowledge of planes, as a general matter were the weights of military aircraft heavier or lighter than similar aircraft of the same type used by commercial airlines?

A. Heavier.

(Testimony of Henry G. Andrews.)

Q. What is the basis of your conclusion, sir?

A. The Military do not maintain the same safety standards that the commercial operator does, and they operate them in military service without the same safety precautions as to weight, performance, and so forth.

As an example of that, there are some military types of planes that will not meet the requirements for a commercial license.

Q. Now, Mr. Andrews, were there any structures or revetments put on the Airport during the time of your tenure there by the Military?

A. Yes.

Q. What is a revetment?

A. The ones that were placed there were an earthworks that were built up high enough in a sort of a "U" shape that [372] a plane could be placed within it to protect it against bombing in case of a bombing raid at the Airport.

Q. And when were those placed at the Airport by the Military?

A. Immediately after Pearl Harbor when the Military started moving planes into the Airport.

Q. And how many of them, approximately, were on the Airport?

A. To the best of my recollection, there were probably 20 or 30 of them.

The Court: I now have a mental picture of it myself. Pass along.

Mr. Dyer: Q. Where were these revetments located with reference to the taxi-ways and runways?



(Testimony of Henry G. Andrews.)

A. They were so dispersed that planes could have ready access to the runways, and in close proximity.

Q. During the time you were at the San Francisco Airport did you ever have any discussions with City employees there concerning revetments?

A. Yes, sir.

Mr. Thomson: I—— Well, go ahead.

Mr. Dyer: Q. With whom did you have those discussions?

A. I particularly recall discussions with a Mr. Werner who was, I believe, the Field engineer at the Airport.

Q. What did that discussion concern with reference to those revetments?

A. The weight of the revetments causing a pressure downward, [373] which caused the earth to press up under the runways and various other parts of the field, which was very destructive to it.

Q. And generally, for the record, when did these discussions take place?

A. Throughout the year 1942.

Q. Yes, sir. Now, Mr. Andrews, when did you first obtain knowledge that the Constellation was in production?

Mr. Thomson: I submit that is incompetent, irrelevant and immaterial, and would not be in any wise binding upon the City.

Mr. Dyer: Your Honor, the pleadings are very clear that the City alleges that there was no contemplation in the minds of the representatives of



(Testimony of Henry G. Andrews.)

any of the parties that heavy planes would come into use. This man was the chief representative of TWA at the time, and I wish to find out what his contemplation was in connection with that allegation of the City. I think it directly meets the issues in this case and directly meets the issue and the evidence which was adduced by the City.

The Court: Read the allegations.

Mr. Dyer: This again, sir, is paragraph 2 of the answer and cross-complaint, of defendant City, and others, and it appears on page 2 of the pleadings, from line 23 to line 29 and states as follows: [374]

"In this connection these defendants further allege that there was not on said date any conception in the minds of any officers or representatives of either of the parties of said document of purported lease that commercial aircraft would ever within the purported term of said purported lease exceed to any substantial extent said maximum permissible take-off weight."

The Court: "Take-off weight"? What does that mean?

Mr. Dyer: May I ask the witness that question, sir? He is much more competent than I am to reply to it.

The Court: What is that?

The Witness: Airplanes are built, when they get to a large category, where their stresses are such that the landing stress is greater than the take-off stress, so that in landing their weight is restricted. It is necessary for them to burn out a certain amount

(Testimony of Henry G. Andrews.)

of fuel or dispose of it by dump valves before landing so that they come down to what we call a standard gross weight.

By way of example, on the DC-3, which has been commonly spoken of during this case, it had a 24,800 pound landing weight, and the gross take-off weight was 25,200 pounds. In other words, they had to burn out that amount of fuel before they could land so that they wouldn't land at a weight in excess of that, but they could take-off with the [375] 25,200 pounds.

The Court: Would they burn it in the air?

The Witness: Either that or, if an emergency, they had dump valves to release that fuel to lower their weight for the landing.

Mr. Dyer: May I have the question read, please? Well, I think I can rephrase it and perhaps save some time.

Mr. Dyer: Q. When did you first know of the planning of the Constellation?

A. To the best of my recollection, it was about 1938 or 1939.

Q. During the course of your tenure at San Francisco Airport did you ever discuss the Constellation with Mr. Doolin?

A. Yes, a great many occasions.

Q. And were any of those discussions prior to the time of the execution of this lease?

A. Yes, some of them were, I believe.

Q. And what was the substance of those discussions with Mr. Doolin?

(Testimony of Henry G. Andrews.)

A. About the performance, the weight and competitive value of that type of aircraft.

Q. What if anything was said about the possibility that the Constellations might come into commercial use?

A. It was a foregone conclusion that it would.

Q. You say it was a foregone conclusion? What were the sources of your information concerning the existence of the Constellation?

A. At first it was what you might term company-restricted information to prevent competition at meetings of supervisory personnel in Kansas City. Afterwards, through various publications and, in addition to that, company bulletins that were sent out.

Q. You refer to various bulletins and publications that were sent out. I show you this document. What is it, Mr. Andrews?

Mr. Thomson: I will ask that the witness be instructed simply to identify the document.

A. It is a copy of a magazine which was in general circulation at that time.

The Court: What is the date on that? The date?

The Witness: May 15, 1941.

Mr. Thomson: I am going to object, your Honor, upon the same ground that I voiced to your Honor yesterday, that counsel cannot circumvent the rule by simply asking this witness to read from the document matters of any sort that would amount to presenting it in evidence.

I may say to your Honor I have a complete folder

(Testimony of Henry G. Andrews.)

of various other types of documents that are equally favorable to the City, and we could be here for weeks if this is going [377] to be a battle of pamphlets. This is simply identified by the witness, and I think that is as far as he can go.

Mr. Dyer: I haven't concluded yet, sir. I simply asked him what it was.

Mr. Thomson: I didn't object to that.

The Court: There is nothing before the Court.

Mr. Thomson: Yes. We will wait for the next question.

The Court: Very well.

Mr. Dyer: Q. Do you have any knowledge of how widely this publication entitled "American Aviation" was circulated among aviation people in 1941 and 1942? A. Yes, sir.

Mr. Thomson: I object to that as incompetent, irrelevant and immaterial, and I ask that the answer go out.

Mr. Dyer: I am laying a foundation, if your Honor please.

Mr. Thomson: I don't think the extent of the circulation makes any difference. The Examiner's Sunday Supplement could be identified as widely circulated, but it wouldn't change the rules of evidence.

Mr. Dyer: All right, I will change it.

Mr. Dyer: Q. Did you ever see a copy of this magazine, American Aviation, in Mr. Doolin's office, at the San Francisco Airport in 1941 or 1942?



(Testimony of Henry G. Andrews.)

Mr. Thomson: I object to the question as incompetent, irrelevant and immaterial. [378]

The Court: He may answer. Objection is overruled. Did you?

A. Yes, sir.

Mr. Dyer: Q. Did you have any knowledge of the existence of this document, American Aviation, in 1941?

A. Yes, sir. I have a subscription to it.

Q. What does this document refer to, Mr. Andrews?

Mr. Thomson: If your Honor please, I think that question is objectionable upon the grounds I have indicated.

The Court: I will sustain the objection. We would be here for considerable more time.

Mr. Dyer: Your Honor, may I make an offer of proof, briefly, on this, and may I indicate the purpose of the offer?

The Court: Proceed.

Mr. Thomson: I don't think this is a proper subject for an offer of proof.

Mr. Dyer: I believe it is. It goes directly to the issue that the representative of TWA and the representative of the airline had in mind contemplation——

The Court (interposing): In any event, you have a record of it.

Mr. Dyer: But not with reference to this precise subject of Constellations. We have a record to some extent, yes, sir, but I wish to complete that



(Testimony of Henry G. Andrews.)

record with reference [379] to this very precise notation concerning the indication of the existence of the Constellation.

Mr. Thomson: Your Honor please, I would then ask the privilege of bringing the Court a huge volume of periodicals upon which I will undertake to make offers of proof, which will probably occupy a couple of days at least.

The Court: You will now proceed, gentlemen, with this case.

Mr. Dyer: May I make the offer of proof, sir?

The Court: You may.

Mr. Dyer: This witness would testify that in 1941 he was a subscriber to the periodical entitled "American Aviation", and that he saw copies of this document in Mr. Doolin's office on various occasions in 1941 and 1942.

He would testify that he is familiar with the contents of this specific document, which is entitled "American Aviation," dated May 15, 1941; and that he was familiar with the facts stated therein, which state that on that date 80 Constellation planes had been purchased—had been purchased by TWA and by Pan American Airline, 40 each.

He would further testify that that document brought to his notice and the notice of Mr. Doolin the fact that those 80 planes were then, on that date, under construction at the Douglas Aircraft plant in Santa Monica, California, and that the first plane of that type was scheduled for test [380] flight later that year, referring to 1941.

(Testimony of Henry G. Andrews.)

The Court: Now, will you indicate the purpose of that offer?

Mr. Dyer: Yes, sir. The purpose of this offer is to show that on the date the lease was executed, and prior thereto, Mr. Doolin, as a representative of the City, and Mr. Andrews as a representative of TWA had in contemplation that planes in excess of 25,000 pounds gross take-off weight would during the course of that lease be put into commercial service.

The Court: Does that document indicate that?

Mr. Dyer: I believe it does, sir.

The Court: It doesn't appear as yet.

Mr. Dyer: I think that it shows that on that date 80 of them had been ordered by two of the major airlines which were serving San Francisco Airport.

The Court: What relation has that to weight?

Mr. Dyer: Your Honor, these planes are planes of 94,000 pounds gross take-off weight, and they are the heaviest——

The Court: This document you are trying to get into evidence doesn't indicate that, does it?

Mr. Dyer: Yes, it does.

The Court: Read that item.

Mr. Dyer: There is a sentence in the second page of this document which says, "Gross weight of the plane is [381] 37 tons." It also says, "Useful load is said to be 16½ tons or 33,000 pounds. Range of 5,000 miles. Would bring about revolutionary changes in air transportation, especially to points outside the U.S."

(Testimony of Henry G. Andrews.)

May I also point out to your Honor that the pleadings make specific reference to the Constellation, which is the subject matter of the document contained in this offer of proof. The pleadings state, sir, and agree that those planes are approximately 94,000 pounds. That is a correct statement, Mr. Thomson?

Mr. Thomson: That is mentioned in the cross-complaint.

The Court: Well, I think we had better get a record on it, then, if there is any question on it. Proceed.

Mr. Thomson: This will be subject to a motion to strike, your Honor.

The Court: It will go in subject to your motion to strike and over your objection.

Mr. Dyer: This offer of proof is also made——

The Court: Now, dispense with your offer of proof and make proof, if you have it, whatever it may be.

Mr. Dyer: Q. Were the Constellations used in military service at the time the lease was executed or prior thereto?

A. To the best of my recollection, they were not.

Q. When did they first come into use, into military service, to the best of your recollection? [382]

A. 1943.

Q. And when did they first come into commercial service? A. Oh——

The Court: 1945, wasn't it?

A. I believe it was 1946, your Honor.

(Testimony of Henry G. Andrews.)

The Court: 1946? All right.

A. To the best of my recollection. It is a little dim on the exact year.

Mr. Dyer: Q. They were taken over by the Army, during the war, from TWA?

A. They were—— Well, yes, they were taken over by the Army.

Q. Did you have any knowledge of the existence and construction of 80 Constellation planes in 1941?

A. Yes, sir.

Q. And did you know where they were being constructed? A. Yes.

Q. Did you know approximately how heavy they would be? A. Yes, sir.

Q. What was the source of that information?

A. Publications that were—public publications, that is, those in general circulation, and company bulletins, and information received at supervisory meetings in Kansas City.

Q. And did you discuss that matter with Mr. Doolin from time to time? A. Yes, sir. [383]

Q. Specifically, the Constellation?

A. Yes, sir.

Q. Before 1942? A. Yes, sir.

Q. October 1, 1942? A. Yes, sir.

The Court: I don't know, counsel, maybe I made myself misunderstood. I am not excluding that document.

Mr. Dyer: Oh.

The Court: I indicated to you to dispense with

(Testimony of Henry G. Andrews.)

your offer of proof and present your proof for the record.

Mr. Dyer: I see, sir. Then at this time——

Mr. Thomson: Subject to the motion, your Honor?

The Court: Yes, subject to motion to strike and over your objection.

Mr. Dyer: Then at this time I will offer the document in evidence and ask it be identified and received in evidence.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 23 admitted and filed in evidence.

(Thereupon magazine entitled "American Aviation" dated May 15, 1941 was received into evidence and marked Plaintiff's Exhibit No. 23.)

Mr. Dyer: Q. During the period you were at the Airport from 1937 to 1947 were improvements going on? [384] A. Yes, sir.

Q. Were those improvements constant or intermittent, or how constant were they?

A. I would say they were continuous up to the time the Military took over and interrupted.

Q. During the time you discussed the lease with Mr. Doolin was any reference made to a 1942 schedule of rates and charges?

A. I never heard anything referred to as such.

Q. Did you know of the existence of a 1942 schedule of rates and charges at that time?

Mr. Thomson: Objected to as incompetent, irrelevant and immaterial.



(Testimony of Henry G. Andrews.)

The Court: If he knows, he may answer. Objection overruled. Did you?

A. No, sir.

Mr. Dyer: Q. Now, in 1942, before the utilization of the Stratoliner, did you observe the condition of the parking areas in front of the hangars from time to time? A. Yes, sir.

Q. And what was the condition observed by you?

A. There were a great many cracks in them, and sinkholes where trucks had run over them, and various other sorts of disrepair which were temporarily repaired from time to time.

Mr. Thomson: I ask that the testimony, that part of [385] the answer of the witness which refers to trucks going over the places of these deteriorations go out as a conclusion.

The Court: It may go out.

Mr. Dyer: Q. What type of planes were using those parking areas at that time?

A. Well, almost all types that were in existence at that time, including the military planes that were brought there in the early part of 1942.

Q. Specifically, what type of military plane did you observe use those parking areas?

A. The greatest number were P-28's and P-51's, I believe.

Q. Did you ever observe any damage done to that area by those planes? A. Yes, sir.

Q. What was the nature of that damage, or what was the nature of the operation which did the damages observed by you?

(Testimony of Henry G. Andrews.)

A. One in particular was a P-38 plane that lost an engine and landed on the ramp and into the partition between hangars 3 and 4, damaging both the ramp and the hangars.

Q. Was there any type of operation of the P-38 in taxiing that would damage it, as observed by you? A. Yes, sir.

Q. Will you please describe that operation to his Honor?

A. Yes. By locking the wheel with their brake on the inner [386] arc of a circle when they started to taxi, which had a grinding effect on any surface which it was on, instead of allowing it to roll. It was probably done because of the extreme hurry in getting military craft out. Commercial craft don't do that.

Q. This was before the utilization of the Boeing Stratoliner? A. Yes, sir.

Q. And before the lease? A. Yes, sir.

Q. Did you ever discuss with Mr. Doolin before the lease was executed the plans that he had for extension of the airport facilities, including the ramps and runways? A. Yes, sir.

Q. Specifically, when were these discussions held with him?

A. Those were almost continuous discussions throughout the time I was at the field. Various occasions when I would visit with him in his office and had other business there to transact.

Q. What was the substance of those discussions?

A. As to the ultimate development, and his plans

(Testimony of Henry G. Andrews.)

toward the development of the Airport, which he kept on a drafting board in his office.

Q. Did he ever discuss with you the contemplated length of runways?

A. Yes, those were discussed and projected on these drawings. [387]

Q. What were the runways with reference to length which were discussed and which were projected on the drawings seen by you?

A. There was one projection extended out 12,000 feet that I recall, and another one which was in the distant future, as he stated, that extended almost to Coyote Point, and acquisition of the tideland property, I believe he called it, was blocked out with the various owners' names on it.

Q. Do you know, Mr. Andrews, whether an extension of a runway or construction of a new runway was commenced in 1942 or prior thereto?

A. There were new runway constructions during the time I was at the field. The exact amount of it, my recollection is a little dim.

Q. Do you have any recollection of the length of the runway which was planned or in contemplation by Mr. Doolin in 1942?

A. There was one in the neighborhood of 8,000 feet.

Q. Do you know to what extent that planning had reached, whether or not it was definitely planned or merely in the preliminary stages?

A. There were some thoroughly detailed drawings on this drafting table in his office which I saw.

(Testimony of Henry G. Andrews.)

The Court: We will take a recess.

(Short recess.) [388]

Mr. Dyer: I have no further questions to put to Mr. Andrews on redirect.

### Recross Examination

Mr. Thomson: Q. Mr. Andrews, you testified that the Constellations were ordered from whom?

A. The Lockheed Aircraft Company.

Q. I don't believe you used the term Lockheed; you used some other name, I believe it was Douglas. Do you want to stand corrected?

A. I will stand corrected if I misstated.

Q. The different Constellations that were produced varied in weight, did they not?

A. How is that?

The Court: They varied in weight.

A. Oh, yes, sir.

Mr. Thomson: Q. In other words, I take it, there was a Constellation originally produced and that subsequent Constellations from time to time increased in weight? A. Yes, sir.

Q. And the variance was always in the form of an increase? A. Yes, sir.

Q. How many Constellations did TWA actually take delivery of?

Mr. Dyer: Will you fix the period, please, Mr. Thomson?

Mr. Thomson: Well, when they were delivered. The [389] witness testified to a certain number being under order, and he coupled Pan American,

(Testimony of Henry G. Andrews.)

I believe, with the order. I want to find out how many TWA actually took.

The Witness: May I correct counsel? I didn't testify to that.

Mr. Thomson: I beg your pardon.

The Witness: I beg your pardon; I didn't testify to the number ordered.

Mr. Thomson: You said there were certain——

The Witness: I believe that was in the document submitted.

Mr. Thomson: Q. You said there was a certain number in production. Was that your testimony?

A. No, sir; I didn't testify to the number of Constellations.

Mr. Dyer: Mr. Thomson, I think the document clearly shows that.

Mr. Thomson: Which document?

Mr. Dyer: The document that I offered and was received in evidence. It says here——

Mr. Thomson: Oh yes; wait a minute; let me look at it. With the reservation of my right to move to strike, I want to put a couple of the next ensuing questions to the witness.

The Court: Very well.

Mr. Thomson: Q. How many of the 80 planes referred to [390] in this document did TWA take delivery of?

A. I believe if you will reread that sir, there were about 40 to be delivered to Pan American.

Mr. Thomson: That is what I wanted to find out.

The Witness: About 40, to the best of my recol-



(Testimony of Henry G. Andrews.)

lection or thoughts at present, in the neighborhood of about 30.

Mr. Thomson: Q. That is, TWA took actual delivery of 30?

A. To the best of my recollection. I couldn't testify to that accurately.

Q. Those of course were not assigned to the San Francisco Airport; they were put into service throughout the system of TWA?

A. I dare say 20 to 25 of them have been in the San Francisco Airport.

Q. But not all at the same time, of course?

A. Hardly.

Q. I refer you to a document which I consider an official document.

Mr. Dyer: May I see it.

Mr. Thomson: Differentiating this document from the type of document thus far presented by the counsel for the plaintiff.

Mr. Dyer: Mr. Thomson, I understand that you consider the publications of the C.A.A. as official documents?

Mr. Thomson: Yes, I will go along with you on that.

Mr. Dyer: All right.

Mr. Thomson: Q. I have here a document entitled, "Statistical Handbook of Civil Aviation," dated in 1949, with a label "U.S. Department of Commerce," on the title page, and underneath that, "Civil Aeronautics Administration" and "For sale by the Superintendent of Documents at Washington, D.C." Are you familiar with this document?

(Testimony of Henry G. Andrews.)

A. No, sir, I am not.

Q. Have you ever seen it before?

A. I believe this is the first time I have seen that particular document.

Q. Then you do not make it a practice to consult this document with reference to these subjects we are talking about?

A. We had more direct orders for our consultation than that information.

Q. You have testified, as I recall, that the military led all other types of aviation so far as weights of planes are concerned? A. Yes, sir.

Q. I call your attention to language at page 45 of this document where the various years are summarized as to weights of planes—and these relate to military planes. The heading of this particular portion is “Average Air Frame Weight of [392] Military Aircraft Produced by Type: 1940, bombers, 7,709; transports, 8,569.”

Do you consider that accurate?

A. Would you read the heading of that again?

Q. “Average Air Frame Weight of Military Aircraft——” A. That is a different definition.

Q. That has to do with——

A. That could be interpreted in many ways: the air frame weight which could apply—which doubtless, with the figures you gave, would apply an airplane less engine and less a great many military equipment, load and so forth.

Q. In other words, your interpretation of it——

A. It would be just the bare——

(Testimony of Henry G. Andrews.)

Mr. Dyer: Just a moment. Let him finish.

Mr. Thomson: Yes; excuse me. I didn't want to interrupt.

Mr. Dyer: Proceed.

Mr. Thomson: Proceed.

The Witness: That would be only a bare frame which would be referred to from that heading.

Mr. Thomson: Q. What was the horse power of this Boeing plane that you flew here to San Francisco in 1940?

Mr. Dyer: I will object to that upon the ground that it is incompetent, irrelevant and immaterial; there is no showing as to horse power of these planes.

Mr. Thomson: Yes, there is, your Honor. As Mr. Thompson [393] testified yesterday, the development of these large planes up now to 120,000 pounds, as your Honor heard, revolves around the development of horse power in order to carry this extreme weight of these large sized planes, and that the horse power——

Mr. Dyer: Just a moment.

Mr. Thomson: Pardon me, please.

Mr. Dyer: I have an objection. I think we get to the ultimate question, your Honor, of how much the different planes weigh. If we go into excursions into horse power and so forth, I think that is a collateral inquiry.

The Court: It goes without saying that if they had not developed these wonderful engines they would be still on the ground with these 25,000 pound

(Testimony of Henry G. Andrews.)

planes. I think that is the purpose of the testimony.

Mr. Thomson: That is, your Honor.

The Court: Proceed.

Mr. Thomson: Q. What was the horse power of that plane?

A. To the best of my recollection it was in the neighborhood of about 3,600 horse power.

Q. You said 3,600?

A. That is the best of my recollection; I haven't had occasion to figure horse power for several years.

Q. What is the horse power of the present Super-Connie now in operation? [394]

A. Of the Super-Connie?

Q. Yes.

A. Which power would you refer to, the median power, climbing power, cruising power or take-off power? There are four different classes of power applied to that airplane.

Mr. Thomson: The witness has been confused, your Honor.

The Court: There is nothing unusual about that; we all get confused.

Mr. Thomson: No, that is quite——

The Witness: Cruising horse power?

The Court: Yes, give us all four.

Mr. Thomson: Q. Let us have all four.

A. The cruising horse power of a Super-Connie will range about 4,800 horse power.

Q. And I think you described this plane that you flew to San Francisco in in 1940 as a four cyclone engine plane?

A. Yes, sir.

(Testimony of Henry G. Andrews.)

Q. Will you give us the figure on that horse power?

A. Again do you want to differentiate the four types of horse power I referred to before.

Q. Pardon me; do you want to differentiate the four types of horse power with reference to the cyclone engine located in that plane in 1940 which you testified about?

A. We did not have the great differential at that time that we have today. I was speaking about the maximum power output [395] that we had on it at that time. When you reduce it to cruising power, it would be considerably less.

Q. When you gave me the figures on the horse power of that cyclone engine in that plane——

A. Yes.

Q. What type of horse power did you intend to give me?

A. That was the take-off horse power.

Q. How much was it?

A. Roughly 3,600.

Q. Can you give me the other types of horse power?

A. With the Boeing 307 we did not have the same differentials that we have with the Super-Connie. There is a cruising power on a Super-Connie or Super-Constellation—pardon my slang—which will run about 4,800 horse power.

Q. Did this cyclone, or rather this Boeing that you mentioned flying into San Francisco in have four engines?

A. Yes, sir.



(Testimony of Henry G. Andrews.)

Q. Was the horse power the same in each one of those engines?

A. Roughly 900 on each one.

Q. In other words, these figures that you have given me are the total——

A. Total horse power.

Q. The combination of all of the four engines?

A. Yes.

Q. Is that also true of the figures you gave me on the [396] Super-Connie?

A. Yes, sir.

Q. What type of octane fuel was utilized in this Boeing plane in 1940 that you have mentioned?

A. I do not recall definitely; it was in excess of 90.

Q. It was in excess of 90?

A. In excess of 90 octane; I don't recall exactly.

Q. But not substantially in excess of 90; 90 is the figure of the octane?

A. 90 would be pretty close. It wasn't less.

Q. And will you describe the type of fuel on the Super-Connie as of today?

Mr. Dyer: We object to that upon the ground that it is incompetent, irrelevant and immaterial. Your Honor, I think we are going far afield if we are getting into types of gasoline. This certainly is not involved in this case.

Mr. Thomson: This is along the same line of Mr. Thompson's testimony of yesterday when he testified that development in the fuel was of the utmost importance.

(Testimony of Henry G. Andrews.)

The Court: I think at this time I will allow it.

The Witness: Which one did you refer to last?

Mr. Thomson: Q. The type of octane fuel on the Super-Connie in operation today.

A. On the Super-Constellation, not the regular Constellation?

Q. The Super-Constellation. [397]

A. Super-Constellation is 115 octane.

The Court: What is it now?

The Witness: 115 on the Super-Constellation.

The Court: With this modern gas, is that the situation now, 115?

The Witness: Well, that is what we use in that particular plane.

The Court: What do they use?

The Witness: In the normal plane, your Honor?

The Court: Yes.

The Witness: We normally use in the regular Constellation, we use 100 octane.

The Court: Does it run any higher than that for any plane?

The Witness: 115 for the Super-Constellation.

Mr. Thomson: Q. You mentioned certain planes flying into San Francisco in 1940 by way of publicity or exhibition or whatever it was. You do not claim that those planes went into service in and out of the San Francisco Airport, do you?

A. You mean into scheduled service?

Q. Yes. A. No, sir.

Q. These two elements of damage to the airport that you have mentioned happened prior to the time

(Testimony of Henry G. Andrews.)

you left the Airport; that is correct, is it not? You left the Airport in 1942 after [398] you had accomplished your mission for this lease, apparently, and these elements of damage you have mentioned that you saw, for instance, the one from the P-38—those bits of damage that you described all were prior to the lease; is that correct?

A. Yes, sir.

Q. And do you remember that incident about the P-38? Wasn't that a crash? A. Yes, sir.

Q. And was that damage repaired?

A. It was quite a while being repaired. They had considerable difficulty there getting it repaired and they were unable to use the hangar for a period of time on account of it.

Q. Do you know whether the United States Government made that repair?

A. That I do not know. I dealt directly with the City.

Mr. Thomson: That is all.

Mr. Dyer: No questions.

We have no further witnesses, if the Court please.

(Witness excused.)

The plaintiff and cross-defendant rested in rebuttal.

Mr. Thomson: We will call Mr. Burr, please.

## GEORGE DAVID BURR

recalled as a witness for the Defendants and Cross-Plaintiffs [399] in rebuttal; previously sworn.

The Clerk: George D. Burr to the stand; heretofore sworn.

## Direct Examination

Mr. Thomson: Q. Mr. Burr, there was a technical word used here this morning which has escaped me. It relates to these piles of dirt.

Mr. Dyer: Revetments.

Mr. Thomson: Revetments.

Mr. Dyer: I think it is r-e-v-e-t-m-e-n-t, but I will not guarantee the spelling.

Mr. Thomson: Q. Mr. Burr, are you familiar with those revetments at the Airport?

A. Yes, sir.

Q. And where were they located with reference to the various runways?

A. They were outside of the landing strip, which is materially outside of the runways themselves. They were built on little spur taxiways on remote location.

Q. How did they individually compare as to size?

A. They were of varying sizes. There were about four of them, as I recall, that were for larger aircraft and the rest were for pursuits.

Q. Four only were for larger aircraft, which embody, I take [400] it, extra size?

A. Yes; my recollection of the count was 17 total; there might possibly have been two or three more.

(Testimony of George David Burr.)

The Court: The purpose of them was to give shelter in the event of bombing?

A. In case of bomb blasts close to aircraft to provide these mounds of dirt in cloth bags.

Mr. Thomson: Q. Did you observe any effect upon the airport from those revetments?

A. Yes, sir, the drainage system was somewhat damaged and the field surrounding was damaged to some extent, which was repaired by the Army as part of their obligation. There was no damage to the taxiways or runways or aprons as a result thereof.

Mr. Thomson: You may take the witness.

### Cross Examination

Mr. Dyer: Q. Do you have any knowledge of approximately how much those revetments weighed, Mr. Burr?

A. I haven't computed it; they were of substantial weight.

Q. Do you have any figure in mind?

A. No, not offhand. These revetments as mentioned were constructed by filling cloth bags largely with earthy material, and of sufficient height to about reach the upper portions of the aircraft to be protected, so they were of substantial [401] weight, built in horse shoe shape.

The Court: Q. In any event, did they interfere with the efficiency of the runways?

A. No, sir, they were built outside of the landing strip areas, your Honor.



(Testimony of George David Burr.)

Mr. Dyer: I think that is all.

The Court: Step down.

(Witness excused.)

Mr. Thomson: Mr. Messersmith, please take the stand.

HAROLD STANLEY MESSERSMITH  
recalled by the defendants and cross-plaintiffs, in  
surrebuttal, previously sworn.

The Clerk: Harold Messersmith; heretofore sworn.

#### Direct Examination

Mr. Thomson: Q. Mr. Messersmith, you know, of course, Mr. Andrews, the gentleman who was on the stand? A. Yes, I do.

Q. Are you familiar with the fact that Mr. Andrews left the Airport so far as active duties at least were concerned in the latter part of 1942?

A. To the best of my recollection, that was approximately the date.

Q. Did you thereafter see Mr. Andrews from time to time? [402]

A. Yes, Mr. Andrews came through the Airport and into the Administration Offices at various times.

Q. And did you meet him at the Airport offices from time to time?

A. Yes, on infrequent occasions.

Q. This is after 1942?

A. Yes, that is correct.

Q. Do you recall an incident where Mr. Doolin discussed with Mr. Andrews certain projections of

(Testimony of Harold Stanley Messersmith.)

the runway and referred to a map or a diagram in his office?

A. I worked with Mr. Doolin in the preparation of a plan that I believe Mr. Andrews is referring to, and to the best of my recollection that plan was not under preparation until the latter part of 1943; and as I recall it Mr. Andrews about that time visited the Airport and showed the plan to Mr. Doolin in my presence and solicited his comments as to what he thought about the plan.

Q. You say Mr. Andrews showed the plan to Mr. Doolin?

A. Pardon me; Mr. Doolin showed the plan to Mr. Andrews. I do not recollect any runways indicated on the ultimate development in excess of 10,000 feet, and to my recollection Mr. Andrews at that time expressed doubt as to whether runways of that length would be required. I do not think he objected to the 8,000 foot runways that were then in effect or then contemplated for development. [403]

Q. When according to your best knowledge did this interview that you have described occur?

A. To the best of my recollection between—the last half of 1943 when we were then preparing plans that would fit into development that was to be undertaken by the United States Government at the Airport—that is, the Army Engineers.

Q. Are you familiar with the horsepower of the Boeing plane of the type that has been described as first flying into the Airport in 1940?

(Testimony of Harold Stanley Messersmith.)

A. Yes, I know the approximate maximum horse power.

Q. That was a four-engine plane, was it?

A. Yes, it was a four-engine plane.

Q. Will you give us the horsepower of that plane by units of engines?

A. I understand the maximum horsepower of the engines there rated at approximately 900 horsepower per engine. [404]

Q. Now, likewise with reference to the Super Constellation, will you give us the horsepower of that, the units?

A. The latest aircraft that I understand is under construction for TWA by Lockheed, a Constellation, calls for an individual horsepower somewhere in the neighborhood of 3,500 horsepower per engine. That would be a total of 14,000 horsepower, maximum.

Q. Do you have familiarity with a type of operation that has been referred to in the evidence thus far as locking of a wheel? Have you observed that from time to time at the Airport?

A. Yes, I have observed it from time to time, and we caution the airlines not to do it, ask them to disseminate the information as to the fact that it causes deterioration or destroys the runway surfaces. We continually have to keep up campaigns of this nature to minimize those abuses.

Q. Will you describe the extent of any deterioration caused in that regard by the present heavy

(Testimony of Harold Stanley Messersmith.)

planes now in use as contrasted with the lighter planes formerly in use?

A. Well, a light plane on a—a lighter plane does not necessarily damage the airplane. As to——

Q. You say damage the airplane?

A. Damage the paving.

Q. All right.

A. If it is an extremely light airplane that locks its [405] wheels in the turns, no damage frequently will ensue; and the greater the weight of the craft, the more damage to the paving sustained by the locking of the wheels.

Mr. Thomson: You may take the witness.

Mr. Dyer: I have no further questions.

Mr. Thomson: That is all, Mr. Messersmith.

(Witness excused.)

Mr. Thomson: Your Honor, as I indicated, I sent for a copy of the Call for Bids with reference to the TWA lease. Unfortunately, the gentleman who turned them over from the real estate department has left. I take it, counsel, you will accommodate me by stipulating the authenticity of this?

Mr. Dyer: Yes.

Mr. Thomson: Now, without the necessity of reading all the way through that, what I am going to offer are the last three lines of the second paragraph.

Mr. Dyer: I would like to inquire at this point whether this is the same document attached to the lease?

Mr. Thomson: The document you attached to the



lease I believe was the resolution of the Board of Supervisors. This is headed "Notice of Lease", and what it amounts to is the call by the Director of Property for competitive bids.

I don't have in mind that you attached it to any other documents. You might review those documents that you did attach to the complaint. I don't recall that you did. Is it [406] alright to stipulate to the authenticity of it.

Mr. Dyer: Yes.

The Court: Subject to correction.

Mr. Dyer: Subject to any question that we might bring to the attention of the Court.

Mr. Thomson: That will be agreed on. We are interested in accuracy along with counsel.

The Court: Yes.

Mr. Thomson: This is headed "Notice of Lease", and I take it your Honor will not desire me to read the whole document because what I refer to is contained within three lines. If I may just read that portion, anything counsel wants to add, he may.

In the second paragraph it in substance provides that the premises are to be leased to a person, firm, or corporation engaged in the transportation by aircraft of persons, property, etcetera. And then that paragraph terminates with these words:

"Subject to the provisions of said Ordinance No. 1736——" Is that it?

Mr. Dyer: That is what I get, Mr. Thomson.

Mr. Thomson: "——and to the terms and conditions set forth in the proposed lease on file in the office of the Director of Property." [407]



Mr. Dyer: I believe we also should call to the Court's attention the fact that this refers to the terms and conditions set forth in the proposed lease, and also refers in the last sentence of paragraph 1:

"Also 190 square feet on the first floor and 799 square feet of space on the second floor of the Administration Building located at said Airport, together with certain airport privileges and facilities."

I would suggest, Mr. Thomson, we put in this entire document.

Mr. Thomson: Yes, I will do that, if that is what you desire. I offer this in evidence, if your Honor please.

The Court: It may be admitted and marked.

(Thereupon call for bids referred to above was received in evidence and marked Defendants' Exhibit Q.)

Mr. Thomson: We have concluded with surrebuttal.

Mr. Dyer: I have nothing further, sir, except this: I am going to ask, in the light of Mr. Thomson's statement that he considers the report of the Civil Aeronautics Administration an official document, that the Court take judicial notice of the contents of a publication of that Administration dated May 8, 1941, which concerns the weight of aircraft to be considered in the design of runways, aprons, paving areas, for the next ten years,—subsequent ten years. [408]

Mr. Thomson: Do you have a copy of that with you?

Mr. Dyer: I do not have a copy of that with me.

We are endeavoring to obtain it. We may make reference to it in our briefs.

Mr. Thomson: Well, I don't think we should keep this case open just for the purpose of further documents.

Mr. Dyer: I don't propose to introduce it. I am simply asking the Court to take judicial knowledge of the contents of that document that you——

Mr. Thomson: No, no, no.

Mr. Dyer: ——stated was an official document.

Mr. Thomson: I don't think that is within the realm of propriety. I think you at least have to introduce the document in evidence. An official document doesn't mean you can ad lib reference to anything you find in an official document. I think we should have the right to compare the document, and we may have documents or matters that would be in refutation of that document. We ought to know what it is all about, in other words.

Mr. Dyer: I think you are entitled, Mr. Thomson, to know the contents of any document we refer to, and of course if we refer to any document in our brief or any subsequent papers filed with the Court we will furnish you a copy of that document. But at the same time, I think the Court can take judicial notice of the contents of an official [409] publication of the United States Government, and that is all I am adverting to.

Mr. Thomson: I don't know whether that is true or not.

The Court: Are you familiar with the subject matter of this document?

Mr. Thomson: No, I am not, your Honor.

Mr. Dyer: The subject matter is this, if the Court please: It is a publication of the Civil Aeronautics Administration dated May 8, 1941, and it contains the design data for paved runways and loading standards, and says: "Probable future. Ten-year maximum. Static. Loads to be considered in the design of runways and aprons and paving and drainage structures."

And for Class 3 airport it states 150 thousand pounds with reference to weight of aircraft, and for Class 4 airports, 300,000 pounds. And Class 4 City is defined as "Cities representing the major industrial centers of the Nation and important junction points or terminals on the airway systems."

The Court: Where did you get that language?

Mr. Dyer: This language was furnished to me by a technical employee of TWA who stated he obtained it from this document.

The Court: The document is not in evidence?

Mr. Dyer: I do not have it with me, no, sir.

The Court: I can't consider it unless it is based on [410]

Mr. Dyer: It has been temporarily mislaid, your Honor, and I am simply asking the Court to take judicial notice of the contents of that document as we refer to it.

The Court: I don't want to mislead you. It means nothing to me unless it is produced. I say that kindly.

Mr. Dyer: I understand, sir. Can we reserve the right to produce it, your Honor?

The Court: Can you produce it by 2 o'clock?

Mr. Dyer: I doubt it, sir. This is a far-flung airline system and it is difficult to obtain documents of that nature.

The Court: I am here to serve you gentlemen. You will have to proceed. You answered ready for this trial.

Mr. Dyer: Well, we ask the right to produce that document for the benefit of the Court, and also ask the Court to take judicial notice of its contents on the ground it is an official document of the United States Government, and that counsel has stipulated that documents——

The Court: Who here is familiar with the document we are discussing?

Mr. Loring: I am, your Honor. I have seen the document, and I am the one who prepared the memorandum from which counsel just read.

The Court: What kind of document was it?

Mr. Loring: It is a booklet very much like the booklet [411] that Mr. Thomson interrogated his witness about. It has in detail the rules of the CAA on design of airports and what cities of different classes will expect in the future.

The Court: When was it published?

Mr. Loring: It was published May 9th, 1941. I examined the document at the head office of TWA in Kansas City, in their files there, and I made these excerpts from the document.

Since that time, which was about several months ago, the document has been mislaid and we cannot locate it. And we haven't had an opportunity to go



to the CAA in Washington, or possibly we could get it in Oakland, to get another copy of the same document.

The Court: We will take an adjournment until 2 o'clock. You may be able to locate it. Tell me, with that thought in mind, that will be the case? Submitted?

Mr. Dyer: That would be our case, Your Honor. At this time it may be in order to make certain suggestions to this Court that Mr. Thomson and I have given some thought to. With reference to the motions to strike, your Honor, they are rather numerous and we believe they concern questions of law, and it is our thought that considerable time could be saved if those motions were presented to the Court by way of written motions.

Mr. Thomson: I am going to suggest to your Honor that [412] this case be submitted upon briefs, and I don't think in the light of that that there should be any extended legal argument on the motions. They should be merely motions to strike, with each side being given the opportunity to respond.

Mr. Dyer: Yes.

The Court: How much time do you wish on the briefs?

Mr. Thomson: How much time would you require, Mr. Dyer?

Mr. Dyer: I would suggest that 30, 30 and 20, your Honor.

The Court: I would forget everything we have gone over for the last four days by that time.



Mr. Thomson: I didn't understand what your Honor said.

The Court: My memory won't carry me over that period of time. I think we should have argument on it and get the theory of the case on both sides of the case, and it may be you wouldn't have to file briefs.

Mr. Thomson: Would it be agreeable to your Honor to submit briefs in the first instance, and then your Honor calls for oral argument and indicate the subjects that you want orally argued?

I will say this, that this is quite a complicated case, not only from the standpoint of facts but from the standpoint of law.

The Court: I understand that. That is the reason I am trying to stay with the case until we dispose of it. [413]

Mr. Dyer: Your Honor, I believe Mr. Thomson and I may agree—perhaps I am just putting his statement in other words—that we file briefs in the case and the Court, if it sees fit, call for oral argument.

The Court: Well, I am here to serve you gentlemen. If I am not here in this case I will be here in some other case.

Mr. Thomson: We, on the other hand, want to accommodate your Honor.

The Court: I think we should cut the time to 10, 10 and 10, and I permit argument after I check through the briefs. That is what I am trying to accomplish.

Mr. Thomson: That would be agreeable to me.

Mr. Dyer: Could you make that 15, your Honor?

Mr. Thomson: Why don't we make it 15, 10 and 5? That is the same length of time?

Mr. Dyer: That is agreeable to me.

The Court: 15, 10, 5? Is that agreeable?

Mr. Dyer: Yes.

The Court: That will bring us to what date?

The Clerk: That will be October 16th for submission.

Mr. Dyer: All right, your Honor, and we may in the meantime file our written motions to strike?

The Court: You can get together on that, perhaps.

Mr. Dyer: Yes, sir. [414]

The Court: Now, I am sure I will call for oral argument. On account of it being the type of case it is, after you submit your briefs, I am going to set it down on the calendar for oral argument. So keep that in mind. If both sides prepare well, it will be helpful to the Court.

Adjourn to 2 o'clock.

(Thereupon an adjournment was taken to the hour of 2 o'clock p.m. this date.) [415]

Mr. Dyer: If the Court please, during the noon recess counsel for plaintiff made inquiry of the Regional Office of the Civil Aeronautics Administration and was advised that the pamphlet to which we referred and to which we adverted in our offer of proof was in existence, and we made rather strenuous efforts to discover a copy of it in this area and were finally advised it was not available here.

On that basis I believe I should state to the Court

that we simply request that judicial notice be taken of that document on the basis that it is an official publication of the Civil Aeronautics Administration which is a division of the Department of Commerce of the United States Government.

Mr. Thomson: If your Honor please, I think that the rule of judicial notice is one thing and the rule of admissibility in evidence of official documents is quite another thing. I believe that in all fairness under the rules of evidence as I conceive them, we are entitled to be confronted by this very document. We may in that event feel the necessity of offering to your Honor some evidence upon this document or some other document, and to allow counsel to simply at random refer to what he characterizes as an official document in his brief is not in fairness to this defendant.

The Court: I always find an avenue of escape on these [416] matters. You will have plenty of time to get it. This case, after you file your briefs, will be set down for further trial and limited to that document. How is that?

Mr. Dyer: That is agreeable.

Mr. Thomson: You mean if the document is available we will receive it at that time?

The Court: The document must be here so that you have an opportunity to be confronted with it whatever it may be.

Mr. Thomson: Yes. Of course, I don't know what it is. I may feel constrained to ask your Honor to reopen the case on it.

The Court: It is limited to the document under discussion.

Mr. Thomson: Yes.

Mr. Dyer: Your Honor, I should like to offer in evidence a similar document of the Civil Aeronautics Authority. We were able to obtain a copy of this document. It is dated May 1, 1940. Page 43 thereof contains recommended standards for probable future maximum static gross loads to be considered in the design of runway and apron paving and drainage structures, for Class 4 Airports of 300,000 pounds. Here is that document, Mr. Thomson.

Mr. Thomson: I should like to not make any objection to this document, but I should like to recommend that the whole document be introduced.

Mr. Dyer: That is agreeable. [417]

Mr. Thomson: So that we may have sufficient time to examine the document.

The Court: No objection?

Mr. Dyer: That is agreeable. I now offer for identification and in evidence that document headed, "Civil Aeronautics Authority, Technical Development Division, Airport Section. Airport Design Information." And it also bears the notation "Prepared for the Instruction and Guidance of the Airport Section Engineers in their Field Consultation Activities," and dated May 1, 1940.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 24 admitted and filed in evidence.

Mr. Dyer: I have nothing further, if the Court please.

(Whereupon document above referred to was marked Plaintiff's Exhibit No. 24 and admitted into evidence.)

Mr. Thomson: I have nothing further, if the Court please.

The Court: There will be no extension of time on the briefs, gentlemen, so we will finally dispose of this matter—it went over to what date, Mr. Clerk?

The Clerk: October 16th, Your Honor, for submission.

The Court: After I check on the briefs, since there are some matters in relation to this case that I will probably have some difficulty with, I will have you gentlemen come in and take the work and labor off my shoulders and give you an [418] opportunity to persuade me of whatever your views may be; but I want to check on the cases cited and the theory of your case.

Over to what date?

The Clerk: October 16th.

The Court: October 16th.

Mr. Thomson: The schedule for the filing of briefs is——

Mr. Dyer: Fifteen, ten and five.

Mr. Thomson: Fifteen, ten and five.

Mr. Dyer: It is understood we will file written motions to strike.

Mr. Thomson: Well, in the time that is allowed



for the briefs you are also going to file written motions?

Mr. Dyer: That is correct.

Mr. Thomson: So that your fifteen days, without being too hard-boiled, starts tomorrow.

The Court: You can on reference to your record prepare a digest of it. You have the transcript so you will have no difficulty on that score.

Mr. Thomson: Does Your Honor desire a copy of the document you just mentioned?

The Court: Not necessarily. If you gentlemen don't protect yourselves, don't expect me to protect you. However, I will leave this thought with you:

I allowed the widest latitude, left the door open for [419] counsel to almost present anything. I say that advisedly. Do I make myself clear?

Mr. Dyer: No, sir.

The Court: The scope of your examination covered such a wide range that counsel had an opportunity to answer that.

Mr. Dyer: Yes, I understand, sir.

The Court: That is what I meant.

[Endorsed]: Filed December 3, 1953.

TRANSCRIPT OF ORAL ARGUMENT  
TO THE COURT

Wednesday, December 30, 1953, 10:00 a.m.

The Clerk: Trans World Airlines, Incorporated vs. City and County of San Francisco, further argument.

Mr. Holm: Ready for the defendant.

If Your Honor please, before we proceed to argument, which I assume we are here for this morning, I would like the privilege of correcting our record in certain respects.

I have presented these documents to Mr. Dyer before the Court came into session, and they relate to rates and charges as they are established by the Public Utilities Commission for the three years involved and as they were eventually passed by the Board of Supervisors.

In the first group, which Mr. Dyer has agreed that it will not be necessary to call the deputy clerks who have signed these documents in the interest of time saving on the record, but whatever objections legally he has to make, I assume he will reserve to himself; but the first group of papers that I desire to introduce and to be given the appropriate number or initials is Resolution No. 4423 of the Public Utilities Commission that was adopted on June 2, 1941.

That is a resolution—it is short—that directs the Clerk to publish notice, as required by Section 130 of the Charter, of the hearing of the proceedings. And next under that same letter of exhibit, I desire

to submit the affidavit [421] of publication in the Call-Bulletin, which was then the official publication, of the requisite number of publications of that notice, namely on June 5, 1941, June 6, 7, 9 and 10 of 1941.

The third document under this same exhibit number would be Resolution No. 4474 of the Public Utilities Commission of the City and County of San Francisco, passed June 23, 1941, establishing an airline schedule of rates and charges as of that time. And the final document for this exhibit would be the journal of proceedings of the Board of Supervisors dated Monday, June 30, 1941, and particularly that section of it that appears on pages 1404 and 1405 of this journal of proceedings, which is the schedule of charges to commercial airline transportation companies for the use of the San Francisco Airport in San Mateo County as passed by the Board of Supervisors of the City and County.

I submit these several documents and ask that they be given one exhibit initial and ask that they be admitted in evidence.

Mr. Dyer: No objection.

The Court: So ordered.

The Clerk: Defendants' Exhibits R-1, 2, 3 and 4 admitted and filed in evidence.

(Thereupon the documents identified above were received in evidence and marked respectively [422] Defendants' Exhibits Nos. R-1, R-2, R-3 and R-4.)

Mr. Holm: I have two more here. Excuse me.

Mr. Dyer: Pardon me.

Mr. Holm: I don't like to burden or to take up the Court's time. Without my enumerating each one of the documents for the year 1946, beginning with Public Utilities Commission Resolution No. 7504, and the affidavit of publication of the notice of the hearing given for the statutory time as set forth in the Charter of the City and County of San Francisco, in the San Francisco Chronicle, which was then the official newspaper of the City and County; Resolution No. 7829 of the Public Utilities Commission passed November 25, 1946; and Resolution No. 6106 series of 1939 passed by the Board of Supervisors on December 31, 1946; and Resolution No. 7899 of the Public Utilities Commission passed on January 6th, 1947, and ask that those five documents that I have enumerated be considered as the next in order as an exhibit for the City and County of San Francisco.

The Court: Let the record so show.

(Thereupon documents identified above were received in evidence and marked respectively Defendants' Exhibits Nos. S-1, S-2, S-3, S-4.)

Mr. Holm: And the third group that I have, Your Honor, relates to the year 1950, and so far as identification under the next initial, is a Public Utilities Commission Resolution [423] No. 11093 passed October 16, 1950; and an affidavit of M. M. Potter, as publisher of the San Francisco Chronicle advertising them in the paper, which was then the official newspaper of the City and County of San Francisco; Resolution No. 11182 of the Public



Utilities Commission passed November 20, 1950; and finally Resolution No. 10628 series of 1939 passed by the Board of Supervisors December 20, 1950, and I would ask that those documents all be included as the exhibit for the City and County of San Francisco and be given its appropriate marking.

The Court: Let the record so show.

(Thereupon the documents identified above were received in evidence and marked respectively Defendants' Exhibits Nos. T-1, T-2, T-3 and T-4.)

Mr. Holm: Thank you, Your Honor.

Argument on Behalf of the Plaintiff by Mr. Dyer:

Mr. Dyer: If the Court please, this case concerns the lease executed by Trans World Airlines, an international air carrier, and the City and County of San Francisco on October 1st, 1942.

In the lease the City demised to the airline the use of certain space, such as space for the storage of its planes and space for ticketing and other purposes, for a period of twenty years. [424]

In the same document the City specifically made available to the airline the use of certain facilities such as runways, taxiways and ramps and parking areas, for the same period.

In that lease document, the use of those facilities were made available to the airline for the same lease term, that is, a term of 20 years at a definite rental.

I think it might be helpful to the Court if I



stated the type of operation conducted by the airline and the method or relation under which it operated at the airport at the time the lease was executed and for a short time prior thereto.

TWA recommenced scheduled operations at the San Francisco Airport in 1937. At that time Mr. B. M. Doolin, who was a man of great experience in aviation and who is now director of aeronautics for the State of California, was the chief managing officer of the City and County of San Francisco Airport. He was the manager of the airport and so continued as manager until approximately 1950.

Also about that time Mr. H. B. Andrews, a man also of great experience in aviation, became division manager for TWA at San Francisco. The two chief men thus representing the City and TWA respectively were Mr. Doolin and Mr. Andrews.

At that time, according to the record, Your Honor, TWA was operating its planes on a month-to-month basis and paid rentals to the City and County of San Francisco for the use of certain space and for the use of those facilities on that [425] basis. There was no formal agreement between the City and County and the airline at that time.

Aviation was developing rapidly. The City and County was developing its airport and it desired to retain the presence of an international air carrier such as TWA at the San Francisco Airport.

Mr. Doolin thus approached Mr. Andrews and pointed out to him that the City thought it desirable that it should retain the presence of this in-

ternational air carrier on a sustained basis with the economic and civic advantages that would result therefrom.

It was also pointed out that if a long term lease was entered into, certain advantages would accrue to TWA. Thus, if its charges were set at a certain level for a long term period, TWA would know what its costs would be at the San Francisco Airport for that period.

Thus, Your Honor, to put it as precisely as I can, the advantages were these: that the City would obtain the sustained presence of an international air carrier with the economic and civic advantages that would result therefrom for a long period at the San Francisco Airport, and TWA would be able to know with some certainty what its costs for operations at the San Francisco Airport would be. Those in essence were the considerations that were discussed by those two chief men at the time that the lease negotiations were [426] initiated.

Apparently these discussions were held over a long period of time. Mr. Andrews states that he discussed them with Mr. Doolin from time to time almost from the time in 1937 that he came to the airport.

Formal negotiations apparently commenced six months to a year before 1942. There were many conferences held, and among the things that were discussed was the term of the lease. The evidence of Mr. Andrews is that Mr. Doolin suggested that the term of the lease be for 20 years. [427]

There is also evidence from the record that Mr.

Doolin set the level of the rentals for the lands and also computed the level of the charges or fees for the use of the facilities.

Mr. Andrews at first demurred to the level of these charges on the basis that he thought they were too high. But again it was pointed out to him that the airline would have certain advantages from having this lease, and eventually it was agreed that the lease should be executed in its present form.

During this time and, as Mr. Andrews put it, "when legality became a factor we conferred with the City Attorney and with the Public Utilities' counsel." And the record shows that on at least four or five occasions such conferences were held with the chief officers of the City who advised the parties concerning the legality of the document and the conformity of the document with the provisions of the City Charter.

The lease then was executed on October 1, 1942. It was signed by members of the Public Utilities Commission; it was signed by the Mayor; it was approved by the Public Utilities Commission counsel of the City and County. Thereafter it was unanimously adopted and approved by resolution and vote of the Board of Supervisors.

Since that date the airline has operated under the provisions of that lease at the San Francisco airport and at all times has paid, and still pays, the rentals and charges [428] provided therein.

In its turn, the City has also observed the provisions of this lease and has accepted the rentals

and charges which have been paid by the airline pursuant to the terms of the lease document.

I wish to emphasize to Your Honor that no breach of this lease is claimed by the City and County as a basis for this action. It in effect admits that the lease was fairly and openly entered into after reflection and negotiation.

Its claim in essence is this: that when it found that the lease was not a good bargain as to it, that its Public Utilities Commission, which is manager of the airport had executed this document, could, by the imposition of rate-making power supersede and impose on this document charges substantially higher than those which it had agreed to in the lease document. Thus, in September 1946, a schedule of rates and charges was promulgated which provided for charges substantially higher than those provided in the lease.

Similarly, in 1951 another schedule of rates and charges was passed.

During all this time TWA paid the charges and rentals provided in the lease, and the City, during the time that these schedules were in existence, accepted these rentals and charges.

Finally, however, Your Honor, in 1949, after seven years [429] of operation under the lease, the City advised the airline by letter that unless it paid the rentals and charges provided in the 1951 schedule, which were about 100 per cent over the schedule of rates and charges provided in the lease document, that it would not be allowed to gas its planes



at the San Francisco Airport. This action was then initiated.

Now, Your Honor, I would like to state at the outset that the decision in this case will determine to a great extent the validity, of course, not only of this lease, but of other leases at the San Francisco Airport involving other airlines. It also of course will have a great effect on the validity of similar agreements which are in effect throughout the United States between airline operators and municipal airport operators.

The evidence in this case shows that TWA operates at 51 points throughout the United States, and at those points it operates under lease and contract agreements with airport operators and not by virtue of a Public Utility-Consumer relationship.

With reference to the position of the City in this case, it is, of course, that the rate-making power of the City supersedes and displaces the obligations which its Public Utilities Commission had agreed to in the lease.

It, however, has partially retreated from the position which it initially took and which is stated in its answer and [430] cross-complaint.

The lease, as I stated to Your Honor, concerns both land and facilities. In the answer and cross-complaint, the City raised an issue as to the validity of the entire lease, thus the validity of our lease for Hangar No. 4 and other space which we occupy exclusively at the airport.

However, at the trial of this case and in its



briefs, the City now quite clearly states that it no longer questions the lease of space, of land, of areas that we occupy exclusively. It would thus seem, Your Honor, that the City has no case by its own admission to recover back rents for those areas.

Thus in Paragraph VI on page 16 of its answer and cross-complaint, it prays for \$7,891 for back charges for hangar areas, and it would seem by its own admission that it no longer has a case on that basis.

The first inquiry that perhaps should be made in this argument is the authority of the City to enter into a lease of facilities.

Of course the action of the City and County in entering into leases of both land and facilities both before and after this lease with TWA we believe is rather strong evidence of the understanding of the City that it had such authority.

Thus, Your Honor, in 1940, before the TWA lease was executed, the City and County executed a lease with another [431] airline, a larger airline, at the San Francisco Airport involving a lease of land and a lease of facilities for a long term. And again in 1947, after the TWA lease, it again executed a long-term lease with that airline covering land and facilities at charges and fees different from those stated in the schedule of rates and charges.

In addition, may I point out that the chief law officers of the City at the time this lease was executed apparently advised the parties concerning its validity and its conformity with the Charter.

And it would thus seem that the City itself, by its actions and by the advice given by its chief law officers, was under the understanding that it could validly execute a lease of both land and facilities.

In addition, may I point out to Your Honor, that between the years 1946 and 1948, supplemental agreements were executed on three occasions renegotiating certain portions of the lease charges, but then reaffirming and approving the basic terms of the 1942 lease.

There is also, Your Honor, statutory authority for the leasing of the land and facilities.

Section 2 of the Charter of the City and County specifically empowers the City and County to lease both real and personal property.

Section 93 of the Charter, refers, Your Honor, to the [432] leasing of land. And certainly it must be taken that a lease of land carries with it the rights of ingress and egress and the right to use ways whereby this airline could get its planes to and from the hangars. Without the use of such rights of way and rights of ingress and egress, the use of the hangars would be of no use at all to this airline.

In addition, Your Honor, there is a statute of the State of California, still existing and in existence at the time of the lease, which specifically allowed the leasing of both land and facilities. That is the Municipal and County Airport law of the State of California. It was passed in 1927. That, Your Honor, was the year that the San Francisco Air-

port was created, and it was in existence at the time this lease was executed.

That statute specifically provides that a City operating under a freeholders charter or otherwise may lease or assign for operation such space or areas, appurtenances, appliances or other conveniences necessary or useful in connection therewith. Now, Your Honor, there is specific statutory authority of this State which allows the leasing of space and appliances and conveniences necessary or useful in connection therewith.

I might also briefly mention, Your Honor, Civil Code Section 718(c), which is also cited in our brief, which specifically allows the leasing of both land and facilities, and which was in existence at the time this lease was executed. [433]

I might state, Your Honor, that these statutes could be availed of by a chartered city when there is nothing in the charter in conflict with the statutes. And our examination has revealed nothing in the Charter in conflict with those statutes.

Your Honor, these statutes, we submit, of the State of California, which specifically refer to the leasing of appliances and appurtenances at airports shows the understanding of the Legislature of California that the leasing of facilities at municipal airports is proper.

I might state to Your Honor that there are in the State of California now many airports which make the facilities available to airport operators and plane operators under lease and under contract, and there are statutes of the State of Cali-

fornia in existence now in the Government Code and which are cited in our brief which specifically allow the leasing of facilities at municipal airports.

Doesn't that indicate the understanding of the Legislature of this State that facilities are a proper subject of leasing?

I should also quite briefly like to refer Your Honor to a few appellate cases which indicate the power of a city and county with reference to leasing a municipal airport.

In *Pipes against Hildebrand*, a California case again cited in our brief, it was specifically held that a hangar could be leased at the Fresno Municipal Airport. [434]

In *Laurent against City and County of San Francisco* the question was whether the Public Utilities Commission of the City and County of San Francisco could reject a bid for common space for a parking area for automobiles at the San Francisco Airport. The District Court of Appeal there pointed out that the Public Utilities Commission had broad powers in such a case and that it could determine for itself its procedure and that it could validly lease that common area.

Appellate decisions in other states of the United States which have had to do with the leasing of airports indicate quite clearly that the leasing of facilities is proper. Thus, in *Milwaukee against Town of Lake*, a Wisconsin case, the Court there was concerned there with the validity of a lease of exclusive space for automobiles at that airport. It, however, quite clearly referred to the fact that the



airlines had made contracts with the municipal operator of the airport, which was General Mitchell Field and it stated this, Your Honor:

“The contracts entered into between Milwaukee County and the common carrier passenger airline concerning the use by the latter of the facilities of General Mitchell Field are legal and valid and a proper exercise of the power of Milwaukee County in the management of General Mitchell Field”.

Your Honor, we believe that that latter statement brings [435] us to a consideration of this problem, and it is this: What was the capacity in which the Public Utilities Commission of the City and County acted when it executed this lease and when it fixed the rentals and charges therein? Did it act in its governmental capacity or did it act in its proprietary capacity? That is the thing that is important, because the cases quite clearly hold that if a municipality makes a contract in its business capacity, if it makes a contract with reference to the management of a business such as an airport, that it is bound by that contract to the same degree and extent as any private person or corporation and cannot thereafter, by claiming a governmental power, evade its obligations under that contract.

I might point out to Your Honor at this point that if we did not have a city and county in this case—let us suppose that this was a lease with the Lockheed Air Terminal in Los Angeles, which is a private airport serving international and domestic carriers, that we wouldn't have any question concerning the validity of this lease.



But to get back to the question: In what capacity was this contract or lease executed? May I point this out to Your Honor: That this airport is a big business. It is a business run by the City and County of San Francisco for the benefit of the inhabitants of the City and County of San Francisco. The record shows that over nine thousand employees [436] a day come to the airport.

There are many businesses with which the City and County of San Francisco through its Public Utilities Commission makes contracts. Thus, it makes contracts with the telephone company to provide telephone service. I understand they are going to have a bank down there, Your Honor. They are going to have many other businesses which will be there at the airport just as the airline, who will bring their services and their facilities so that the inhabitants of the City and County can be served.

The point to be made is this, Your Honor: that in the making of those contracts, the City was operating its business, and in so operating its business it was bound by the same rules of law applicable to any private person.

I should like briefly to refer Your Honor to a few of the appellate cases which touch upon that problem. In *Coleman vs. City of Oakland*, a District Court of Appeals case in California, the court pointed out, in deciding the capacity in which an airport was conducted and operated:

“We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity.”

In *Ex Parte Houston*, which was an Oklahoma case, the validity of a contract involving the use of certain facilities and common ways for the use of taxicabs and so forth at the [437] Will Rogers Municipal Airport was at issue. The court there discussed the capacity in which the City acted in operating this airport and in executing that contract, and the court said this:

“Here the City of Oklahoma City was acting in a proprietary capacity as distinguished from a governmental capacity. This fact is the key to the solution of this case.”

Your Honor, the City has taken the position that at any time, by the exercise of its so-called governmental or rate-making power, it can supersede the rates and charges and rentals stated in our lease and impose upon those rentals and charges higher rates.

It has cited cases in its reply brief in support of that position. Those cases, of course, ignore the fact that the contracts involved in those cases were not rate contracts.

A rate, Your Honor, in its true sense, is the price or charge made to the individual public, to the millions of the members of the public, for the provision of a recognized public utility service.

Our position here is that this lease, whereby the airline hires definite space and definite facilities for a definite term, is not a rate contract. It does not involve the provision of a public service to the millions of members of the indefinite public. [438]

The inquiry here, Your Honor, is: Who is the

public in this case? Is it the 12 schedule airlines and the other business operators at the San Francisco Airport who bring their facilities there and use the facilities, or is it the 3,250,000 members of the public who last year utilized the San Francisco Airport?

Your Honor, the rentals and charges included in this lease are not applicable to nor are they paid by any of the members of that 3,250,000 public.

Our position thus is that this is a private agreement for the use of definite space and facilities between the parties and does not involve a rate applicable to the indefinite public.

The appellate cases that have had occasion to discuss their problem, Your Honor, have quite clearly pointed that out. Thus in *Marin Water Company vs. Town of Sausalito*, the problem there was the validity of a contract between a water company and the Town of Sausalito. The water company by contract supplied water wholesale to the Town of Sausalito at stipulated rates for a definite term stated in the contract. The Town of Sausalito in turn used that water to supply the many hundreds of the members of its public. The contract came under attack. Its validity was at issue. The Town of Sausalito refused to pay the charges stated in the contract on the ground that it could exercise its governmental powers. [439] The Supreme Court of the State of California quite clearly pointed out that this was not a contract to which that principle was applicable; that this was simply a contract whereby one utility made its service

available to another utility, whereby in turn the public might be served, and that the indefinite members of the public, the inhabitants of Sausalito, were not parties to that contract, and thus the contract was valid and binding.

The Supreme Court of the State of California in a later case as recently as 1950 also was concerned with that principle and with that problem. There the license contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company was at issue. That was a contract between two utilities. It provided that A T & T would make available to P T & T certain services and facilities at a definite rate for a definite term. The Public Utilities Commission of the State of California sought to impose regulation upon that contract and to substitute for the price stated in that contract a different price set by the Public Utilities Commission. The Supreme Court of this State, with Justice Trainor writing the opinion in 1950, pointed out that this was not a rate contract and that the individual members of the public were not parties to that contract and it therefore was valid and binding. Thus, Your Honor, the court stated this: [440]

“The Commission’s control over contracts affecting rates and services is limited to regulation of contracts that directly affect the service the ratepayer will receive at a particular rate.”

And they further pointed out, since this was simply a contract between two utilities, whereby



the public, in turn, might be served, that it was valid and binding and not subject to regulation.

Your Honor, I think that we might consider for a moment, and possibly it might be helpful, if we considered the cases that deal with the analogy between the use of a dock and a wharf and the use of an airport.

The reason for that is this: That there is a body of law concerning contracts dealing with the use of wharves and the analogy between the use of wharves and docks and airports has been very clearly pointed out in the cases. Thus Justice Cardoza, who perhaps was the first judge to note that close analogy and to state it in an appellate decision, in *Hesse vs. Rath*, cited in our brief, stated:

“A city acts for city purposes when it builds a dock or a bridge or a street or a subway. Its purpose is not different when it builds an airport.”

And in *Coleman vs. City of Oakland*, the District Court of Appeals in this State said:

“Its nearest analogy is perhaps found in docks and wharves. ‘An airport with its beacons, landing fields, runways and hangars is analogous to a harbor with its lights, wharves and docks; the one is a landing place and haven of ships that navigate the water; the other of those that navigate the air.’”

The Courts of Appeals of this country have also noted the close analogy between the two. The Fourth Circuit, in *Mayor and City Council vs. Crown Cork and Seal* stated:

“The analogy to an airport seems to be complete and has been so regarded in other jurisdictions.”

It was referring to docks and wharves.

Your Honor, the cases which have dealt with contracts involving the use of a dock or a wharf have held that when a city makes a contract with a steamship company allowing that steamship company to land its ships at a wharf that the contract is valid for its term and that the charges and rentals stated in that contract during the term cannot be voided by action of the City. That was the decision of the Ninth Circuit, Your Honor, in *Femmer vs. City of Juneau*. In that case the municipal owner of the wharf entered into an agreement with a steamship company whereby the steamship company would obtain the right to land its ship at the wharf for a five-year period at stipulated rates. Later the validity of the contract was questioned, and the court upheld the validity of the contract and stated this: [442]

“\* \* \* it cannot be said by this court that the contract, the substance of which is that the City in return for a guarantee of a steady and substantial patronage, obligates itself to make certain repairs to the wharf and to give Northland a conditional priority in the right to land its vessels at and use the wharf, is not one reasonably necessary to enable it to exercise its powers to ‘establish and operate’ a public wharf.”

We believe, Your Honor, that the Court may consider the close analogy between these cases and the airport cases. Here, Your Honor, we have a landing place for ships and at an airport we have a landing place for carriers of the air. Both landing

places, Your Honor, are usually operated and maintained by the municipal authorities, by boards of public utilities commissions or boards of port commissions. Both, Your Honor, involve charges to the carriers themselves at stipulated rentals and rates, and both, Your Honor, involve charges and rentals and fees which are not applicable to the individual passengers or members of the public of those carriers.

Your Honor, there is another matter that we believe should be adverted to as a basis for upholding the validity of this lease, and it is this: that a rate making power involves an exercise of the power of sovereignty or the power of government. It is a part of the police power, a part of the [443] power to govern the inhabitants of an area.

This airport is located wholly and entirely without the municipal boundaries of the City and County of San Francisco, and it was stipulated at the trial that the City exercises no true police power at the San Francisco Airport which is located wholly in San Mateo County.

The universal rule is, Your Honor, that a municipality may not exercise any of its governmental powers—powers to govern its inhabitants, which includes the power to regulate rates—beyond its municipal boundaries. That is the purport of the decisions which are cited in our brief in support of that point.

The obvious reason for it, Your Honor, is that chaos in government would result if one county were allowed to project its governmental powers

into the affairs of another county and to assume to exercise any powers of government therein.

Now, Your Honor, we do not mean to be understood by that that this City and County has no power to operate the airport or to manage it. We believe that it quite clearly has that power, but that it has that power not in its governmental capacity or in its capacity to govern its inhabitants, to exercise a police power and to regulate rates, but that it has that power in its proprietary capacity, in its capacity to operate and run a business for the benefit of its [444] inhabitants and others in the County of San Mateo.

That being so, Your Honor, and having exercised its power in that capacity, we believe that this contract is a valid contract and binding both as to land and facilities on the parties.

Your Honor may recall that at the trial of this case much of the testimony concerned weight of planes. That testimony, of course, was pertinent at the trial because of the affirmative defense of the City that there was not at the time this lease was executed any contemplation in the minds of any of the parties to the lease that aircraft in excess of 25,500 pounds gross weight would be put into use at the San Francisco Airport during the term of the lease. The basis of that defense, of course, is an excuse for performance.

In essence, Your Honor, the City by injecting that defense into the case and by raising it, say in effect that "We admit that your lease is wholly valid, but we believe that because you put into use



heavy planes which we did not contemplate and that certain damage was done, that we have an excuse for non-performance."

So I believe, Your Honor, that we start off in a discussion of that defense on the basis that the City, at least to that extent, must assume that the lease is valid.

I should like briefly to discuss the law with reference [445] to that defense. The common law for centuries of course has been that mere unforeseen difficulty or expense is no excuse for non-performance of a contract. To put it very simply, Your Honor, the law has always regarded a contract as a contract binding on the parties no matter what the expense or difficulty might be after the contract was executed, and the general rule is that mere unforeseen difficulty and expense is no excuse.

There have been, however, Your Honor, a very few cases which apparently are relied on by the City, which state that if there is unusual difficulty and expense of an extreme degree which is (1) unforeseen and not contemplated at the time the contract is executed, and (2) which the parties did not protect themselves against by provision in the contract, that there may be equitable basis or excuse.

There are two cases cited in both briefs by the plaintiff and by the defendant, California cases, which discuss that doctrine, Your Honor. They are *McCulloch vs. Liguori* and *Lloyd vs. Murphy*.

I think it rather remarkable that the City and County would rely on those cases because both of them, Your Honor, refused to apply the doctrine

of commercial frustration, and they refused to apply it on the principles that I have stated: that the difficulty and expense was clearly foreseeable and the parties could have protected themselves by [446] provision in the contract.

Thus, in one case, Your Honor, Lloyd against Murphy, it was a lease of space for the purpose of selling automobiles. The contract was made in 1941—a year before the TWA contract. Then the war came along and there was a restriction on the manufacture of automobiles. And one of the parties to the contract, the lessee, asked to be relieved from the obligation of its contract upon the ground that he didn't have any automobiles to sell. The court pointed out that in 1941 it would not have been difficult for him to foresee that there would be a restriction on the manufacture of automobiles.

Now, similarly, would it have been difficult in 1942, three years after the war had started and when very large planes were in military operation, for this defendant to foresee the use of heavy planes in this area?

I think it perhaps more pertinent than that though, Your Honor, is the statement in these cases which is set out very clearly that if the parties had attempted to protect themselves against the difficulty complained of in the contract, then the defense is of no avail.

I want to call Your Honor's attention specifically to the fact that the lease in this case provides for charges for the use of planes in excess of 25,500

pounds. That provision is Paragraph III, page 6, and it states thus, Your [447] Honor:

“With respect to any scheduled trip departure on which aircraft exceeding 25,500 pounds in standard gross weights are scheduled by the Lessee to be operated, the monthly fee for that schedule trip departure shall be increased by \$1.00 for each 1,000 pounds”—— and then it goes on to provide for further charges for increased weight.

Now, Your Honor, bear in mind that the allegation in this answer and cross-complaint and the defense of the City is based upon the proposition that at the time this lease was executed they had no contemplation of planes in excess of 25,500 pounds. And here is an express provision in the lease itself providing for the use of such planes at the San Francisco Airport.

Moreover, Your Honor, this comes squarely within the principles of the cases which I have cited which state that if the parties had provided in the contract for the difficulty now complained of, commercial frustration is no defense. And here is an express provision for the use of planes in excess of 25,500 pounds in the lease itself.

There is another facet to this defense, and that is whether or not the use of these planes was foreseen at the time the lease was executed. [448]

The allegation in the answer and cross-complaint is that there was no contemplation in the minds of any of the parties. Now who were these parties, Your Honor? As I have stated, the chief negotiator for the City was Mr. Bernard Doolin, who is a man

of thirty years experience in aviation. His testimony was that he did have contemplation of planes in commercial use at the San Francisco Airport in excess of 25,500 pounds.

He stated that he contemplated use of planes at the time the lease was executed of 100,000 pounds or more.

Mr. Andrews was the other party. He was the chief negotiator for TWA. I am talking now, Your Honor, about the two chief negotiators. And he stated that he had contemplation of planes of 100,000 pounds or more coming into use at the San Francisco Airport, and that he discussed this matter with Mr. Doolin, and that, as a result of those discussions, this escalation clause to which I have adverted and which provides for charges for planes in excess of 25,500 pounds, was included in the lease. That is the testimony of the two chief negotiators, one for the City and the other for TWA.

There is documentary evidence, Your Honor, in addition to the testimony in this case which indicates the contemplation of the parties at the time. I refer Your Honor to the letter of Mr. E. G. Cahill dated August 4, 1937. That was [449] more than five years before the lease. Mr. E. G. Cahill was Manager of Utilities in 1937 and he was also Manager of Utilities in 1942. His signature appears upon the lease. This is what he had to say on August 4, 1947; in a letter which is Exhibit 11 in this case and which was directed to the Public Utilities Commission, he stated as follows:

“With regard to the land plane port”—referring



to the airport “—a radical revision is taking place in the design and operation of land type aircraft. Two years ago we were faced with the airport operating problem of aircraft weighing from 17,000 to 20,000 pounds. Today land planes weighing 24,000 are operating in and out of San Francisco Airport and there are now being built land planes to be put in service next year weighing 42,000 pounds with other designs projecting that will weigh close to 70,000 pounds.”

In 1937 the Manager of Utilities was talking about planes in use “next year” weighing 42,000 pounds, and he was stating that other designs would come into use that would weigh 70,000 pounds. That was five years before the lease was executed.

Your Honor, there are also numerous references in the official reports of the Public Utilities Commission which are in evidence in this case three and four and five years before [450] the lease, and indeed as early as 1936, that refer specifically to the use of DC-4 aircraft. DC-4 aircraft is an aircraft weighing over 45,000 pounds and in the vicinity of 50,000 pounds.

There are also numerous references before the execution of this lease to the use of Boeing Stratoliners.

Thus, Your Honor, there is this specific reference in the official report of the Public Utilities Commission to the commercial use of these planes in San Francisco; in Exhibit 9, which is the report of 1938-1939, or about three years before the lease was executed, the following statement appears with

reference to the use of heavy planes by Trans World Airlines and United Air Lines:

“Plans for the use of four-motored planes by the airlines are progressing rapidly. Both of the lines using San Francisco Airport are definitely contemplating this important step.”

Here is a specific reference in an official report of the City and County of San Francisco that both of the lines using the San Francisco Airport at that time, three years before the lease was executed, were definitely contemplating the commercial use of these aircraft at San Francisco Airport.

We have more than testimony and documentary evidence with reference to that. We have the fact adverted to by Mr. Andrews that these Boeing planes which the City states were [451] the heavy planes that caused some damage were actually landed at the San Francisco Airport two years before the lease was executed.

You may recall that Mr. H. B. Andrews stated that he had held a pilot's license since 1914. His log book that he kept for many years showing the places that he had landed and the dates he had landed and the type of equipment landed is in evidence in this proceeding. That log book shows on June 6, 1940 he landed at the San Francisco Airport a Boeing Stratoliner. Six of those planes had been manufactured at the Boeing Aircraft Company in Seattle and were flown down here and landed at San Francisco.

Moreover, Your Honor, Mr. Andrews testified that he had a clear recollection that a few days after

these planes were landed they departed, and that then two of them came back and various officials of the City were given rides in these planes. That again was two years before the lease was executed. And yet, Your Honor, the City states that they had no contemplation that these planes would ever come into commercial use.

The City also, Your Honor, had knowledge of the Constellation. The Constellation is the heaviest plane ever used by TWA.

Mr. Andrews testified that he knew that these Constellations were being manufactured in 1938. He discussed this [452] fact at the time of the lease with Mr. Doolin, and it was contemplated that they would come into commercial use.

Moreover, Your Honor may recall that there is in evidence in this case a photostatic copy of a widely circulated aviation publication, American Aviation. The date of that document, I believe, is May 1941, before the lease. That shows that at that time there were eighty Constellations being manufactured, forty for TWA and forty for Pan American.

In the light of this evidence, Your Honor, it would seem to us strange that the City would insist that it had no knowledge that these planes would come into commercial operation within 20 years after the lease was executed in 1942. Eighty of them were in manufacture two years before the lease was executed.

The City produced as one of its witnesses Mr. Burr, who is a design engineer. Mr. Burr testified

that he left for the Army in 1940, as I recall, and that he did not return to his official duties until 1947. He was thus not engaged in his official duties at any of the times that these operative facts took place or at any of the times that these planes alleged by the City were put in use at the San Francisco Airport.

However, Mr. Burr referred to a report which he stated was published by a group of Army engineers indicating that at the San Francisco Airport runways and taxiways necessary to [453] sustain heavy planes would not be needed for a protracted period after 1937. And that was 1937. As I stated Mr. Burr left his official duties in 1940.

We have in evidence, Your Honor, Exhibit 24, which is a document issued by the Civil Aeronautics Authority. The Civil Aeronautics Authority is a division of the Department of Commerce, and it is charged with the duty of advising airport operators, particularly municipal airport operators, of the need for particular types of runways and to supply them with design information and construction information so that they can keep abreast of the progress of aviation. That document, Your Honor, is dated May 8, 1941. It shows that for Class 4 cities, which are major cities of the United States such as San Francisco, airport designers should contemplate runways that would sustain maximum gross loads with reference to weights of 300,000 pounds. That was in 1941, and that was information issued by the Civil Aeronautics Authority and made available to all municipal airport designers.



It would thus seem, Your Honor, that here we have official information indicating the trend of aviation at that time.

The basis of the City's position is that when we put in use Boeing Stratoliners in 1945—we started them in 1945 at San Francisco—and Constellations in 1946, that due to the use of those heavy planes, these ramps and runways and taxiways were deteriorated and broken up, and that as a result [454] the City spent a great deal of money in the repair and lengthening and improvement of runways.

Your Honor, that was not the reason why the City repaired and lengthened and improved these runways. Your Honor may recall that Mr. Doolin testified that these various facilities were planned at least five years before the funds whereby these facilities were made possible were voted.

Most of the money which was the source of the improvement of runways and ramps and taxiways at the San Francisco Airport was derived from the twenty million dollar bond issue of November 1945. We believe that, in the light of Mr. Doolin's testimony, that planning for those facilities was five years ahead of that bond issue, that it can clearly be seen that the reason for the expenditure of that money was not the breaking up of the ramps and runways by any heavy planes but civic betterment considerations. That must be so because these funds were asked for and were planned long before the utilization by TWA of any heavy planes at the San Francisco Airport.

Moreover, Your Honor, the record shows that in

1943-1944 the first contract for the construction of a runway to take planes up to 120,000 pounds, heavier than the Constellation adverted to by the City and County—that that runway was started in 1943-1944. Your Honor, we did not put into use the Boeing Stratoliner until 1945 and we did not put into [455] use the Constellations until 1946.

The evidence in this case also shows, Exhibit 17, that on December 11, 1944 the Public Utilities Commission wrote a letter to the Board of Supervisors asking the Board to sponsor a twenty million dollar bond issue. Your Honor, that was before the utilization of any heavy planes by TWA at the San Francisco Airport.

It would thus clearly appear that the reason for the extension and improvement of the San Francisco Airport was a thoroughly laudable desire to better the airport and to improve it for civic betterment considerations, and not because of the deterioration due to any heavy planes.

Also, Your Honor, with reference to that defense, I think this might be said: that it was not the use by TWA planes that caused any breakup or deterioration to any great extent.

Your Honor may recall the testimony of Mr. Burr, and of Mr. Messersmith, as I recall, that they did not believe that light or intermittent use by heavy planes on runways would have any material or damaging effect.

What does the evidence in this case show with reference to the use by TWA of heavy planes? Exhibit 1 in this case, Your Honor, shows that during

the entire time that TWA utilized Boeing Stratoliners at the San Francisco Airport they never at any time utilized them more than two schedules a day. That means two landings and two takeoffs a day. [456] Similarly, when Constellations were put into use, those Constellations were operated for almost a year after 1946 on a one schedule a day basis. That is one landing and one takeoff. And I believe there was only one month during the period in question here that they operated on a three schedule basis of more than three landings and three takeoffs a day.

The Court: We will take a recess.

(Thereupon a short recess was taken.) [457]

Mr. Dyer: Your Honor, at recess I was discussing the fact that there never was any heavy use of runways and taxi-ways by TWA planes at the time this damage was alleged to have occurred. I might point out to your Honor that before the utilization of any heavy planes, that is, planes over 25,500 pounds, at the San Francisco Airport by TWA, and in 1943 and 1944, there were over 1,000 trans-Pacific flights initiated at San Francisco with four-motored equipment weighing in the neighborhood of 50,000 pounds.

They were utilized in military service. The point was made at the trial that those planes, when they took off from the San Francisco Airport, were not fully loaded; that they took off from San Francisco and went to Hamilton Field, I believe it was, and then went on their journey across the Pacific.

I think that is correct. But the point to be made

is this, that these planes, without a full load, as I recall, weighed in the neighborhood of 50,000 pounds. And, your Honor, one year before we utilized the Boeing Stratoliner at the San Francisco Airport there were over 1,000 of these flights initiated with equipment of that weight at that airport.

Now, your Honor, as I have stated, it is the position of TWA that the lease hereon is not a rate contract, and that the rental and charges are neither applicable to nor paid by [458] the individual inhabitants of San Francisco or any members of the public, and that therefore the lease is a valid document. But even assuming—certainly without conceding that these are rates—we believe that the City had power by contract to agree to fix them for a definite term.

There is a line of cases, Supreme Court cases, that hold that where the City has the power to fix rates by action of the Public Utilities Commission, and also has power to fix rates by contract, if it elects to fix rates by contract, that that contract and the rates so fixed are binding during the contract terms.

There is the Home Telegraph against Los Angeles case. I might fairly state to your Honor that in that case it was held that the City of Los Angeles at that time did not have such power. But therein the Supreme Court decided this principle, and that is the important thing. It said,

“It has been settled by this Court that the State may authorize one of its municipal corporations to establish by an unviolable contract the rates to be charged by a public service corporation or natural



person for a definite term not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of a contract the governmental power of fixing and regulating rates."

This principle was also affirmed in Public Service Co., against McCleod, again a Supreme Court of the United States case, and it is held therein that if the municipality exercises the power to contract, the power to regulate the rates during the period of the contract is thereby suspended and the contract is valid.

Now, those cases contain the proviso, however, that express authority for such contract or such lease must appear. We have pointed out to your Honor that the Municipal and County Airport law of 1927 expressly gives a municipal such as the City and County of San Francisco power to lease facilities at the airport. We believe this statute and other statutes cited in our brief constitute a source of power to the City to fix rates by agreement. And our position thus is that even in the event the Court was of the view that rates are involved, the City nevertheless had power to enter into this contract, and that it is bound by the obligations contained therein during its term.

With reference to the matters adverted to by the City in the cross-complaint, may I say this: It seeks to recover back rates. Now, your Honor, the principle is universal that before a particular rate, whether that rate is contained in a contract or otherwise, can be changed and raised, that that particular rate payer who holds that contract must have notice

form the Public Utilities Commission that that particular rate [460] is deemed unreasonable, and, if required, a hearing must be held, and the opinions can be heard against it and findings made thereon.

Now, your Honor, when the 1946 schedule was put into effect, put into use, the rate schedule, and when the 1951 rate schedule, there was a general promulgation by the Public Utilities Commission. There never has been any specific notice to this specific airline that the charges in its contracts were deemed unreasonable. And there never has been any hearing held concerning the reasonableness or unreasonableness of those charges, or any findings made.

The cases cited in our brief are clear that on constitutional grounds opportunity must be given, and if that opportunity is not given the rate is presumed valid until so changed. And until such an opportunity is given no recovery can be had for those back rates.

Finally, may we say this, your Honor, that we believe that this case should be looked at on the basis that here we have a contract fairly open, fairly entered into after long reflection and negotiations by the City and the airline. We believe that this contract was pursuant to the powers of the City to operate and to manage an airport.

We believe that if we did not have a City in this case, that if we had a private airport operator, that there would be no question of the validity of this lease. And we do not believe that a City and County, under the guise of a rate-fixing power, should be

allowed unilaterally and at will to increase the rentals and charges which it fairly entered into by way of contract.

Mr. Holm: If your Honor please, I regret very much that Mr. Thomson who tried this case will not be addressing you this morning, as I feel certain he would have been able to do it far more efficaciously than I. Unfortunately, as you are aware, the Lord saw fit to take Mr. Thomson from our midst since he tried this case, and I will do my best.

I may say that I have studied all pleadings and every word of the evidence in the transcript and I have likewise examined all the briefs that have been submitted and studied them carefully.

Now, this case is probably one of first impression. There isn't anything in the United States that we have been able to find that is directly analogous to the facts that are presented to your Honor in this litigation.

Thus, we have to now view it from the standpoint of the City and County in this proceeding. What do we have? We have a municipality created under the laws of the State of California, given its sovereign powers, and has adopted a home rule provision of the constitution, that is a law unto itself, went into the legislature upon municipal affairs, and there are state laws to that effect. [462]

And we are presented with a picture in 1942 that when at that time the City and County of San Francisco had invested approximately \$3,000,000 of the taxpayer's money for the purpose of acquiring an airport in San Mateo County. The work had

begun earlier than that—began in 1927. I had a hand in the acquisition of it, of the first thousand acres of the land in that airport, acquired under difficulties, as to whether the law even permitted you at that time to condemn for airport purposes or not.

We were successful in acquiring it, and little by little land has been acquired since that time until we have close on to 4,000 acres of very valuable industrial land.

To make it an airport it was required to spend a tremendous amount of money. There was the question of tidelands, swamp and overflow lands was present. We had to fill in. It cost millions of dollars to do it.

Contracting the situation of the roughly thousand acres in 1942 with the present day situation of about \$4,000, and the \$3,000,000 that was invested at that time of the taxpayer's money, we now have, as the record discloses, approximately \$40,000,000 of the taxpayer's money in this project.

And for what?

This is largely addressed, this declaratory judgment of your Honor, to the equity side of the court, to use that expression. And what are the facts?

The whole burden of making an airport possible, and for the very plaintiff in this action and for the 12 other carriers who use the airport facilities, plus the commercial concerns that use it and the private individuals, the private corporations, they have expended, insofar as the airport proper is concerned, and its facilities, for accepting travelers from all



over the world, not merely limited to inhabitants of the City and County of San Francisco, not so much as a thin dime. San Francisco has stepped in and has provided these carriers with the facilities that make it possible for them to conduct their business from a very fruitful source of obtaining business.

You know the injustice of the situation. When we look at it on an equitable way, I think you can sort of parallel it with what exists in railroad transportation. I have yet to find where the railroad companies themselves have not been investing their own capital in providing facilities that cost untold millions of dollars to accommodate the passengers that they desire to transport wherever their roads or connecting lines may go.

Similarly to our situation at the Airport of San Francisco, now located in San Mateo County, they engage in separate enterprises at those stations. Comment has been made in the brief, possibly by counsel this morning, that you engage in many businesses there. That is true. So do the railroad [464] companies. Their stations have all manner and kinds of concessions that are leased out — restaurants, cigar stands, magazine stands. They deal in general merchandise similarly as we do at the San Francisco Airport, and will do with the tremendous new building that is under construction there now, costing the city approximately \$10,000,000.

But unlike the air carriers, the railroad companies themselves have provided those facilities and have put their own capital into investment in them; and when they fix the rate of return that they are

to earn on their invested capital they consider that as part of a rate base on which they are entitled to earn a fair return.

Strictly speaking, that has nothing to do with the taking of a person from one point in the country to another, so far as transportation itself is concerned, but it is a facility that is an integral part and it is necessary to do that.

Likewise, you take the telephone building here in San Francisco. Counsel's firm is now engaged in litigation before the Public Utilities Commission of the State of California, going on today—or it was at least yesterday. I think it is recessed today—and very definitely that 'phone building, a magnificent structure in this city, has not one thing to do with telephony as such. In other words, I mean that it hasn't a thing to do with when you call a number or dial a number and want to have a connection made. Not a thing of that is in the [465] Telephone Company building. It is all occupied by executives and administrators from the company.

Nevertheless, every cent of capital that the company has invested in that Telephone Company building it includes in its rate base and demands, and rightfully demands under the laws of our nation that it be given a fair return.

Now, there is quite a similarity to the cities there that these operating companies like railroad companies, they bear all the expense of it. But, on the other hand, we have plaintiff in this action that hasn't contributed a five cent piece for these facilities under consideration by this Court. The City

has contributed them, and has done so for the purpose of accommodating not the inhabitants of San Francisco alone, as is obvious from the very nature of the business in which plaintiff is engaged. It brings people from all over the world.

Now, the lease of 1942—and designated properly as a “lease”. Nevertheless, when the Court looks upon it, it has to view it, pick it up from its all four corners and construe it as well as may be done with legal precedence in mind.

What was the situation in 1942? True, Mr. Doolin, Mr. Andrews and others discussed the possibility that there were planes that were going to exceed the weight of 25,500 pounds. Yes, that was discussed. They even said that there were some Army planes that were much heavier than that and were almost a [466] reality as of 1942 when this lease was entered into, and that there was thought of things being constructed of far greater tonnage than that.

They had a saying in the early days of aviation that—especially when San Francisco pioneered in acquiring this airport—among the flyers. There were no instruments. It was crude. They used the sun. They used the sextant. They used the compass. And largely they used the expression, the inelegant expression, that they flew by the seat of their pants.

Now, that’s how crude the industry was when San Francisco began. And that’s the situation that confronted us then. It confronted us in 1942. Things that could not be contemplated within the fair projection of a man’s mind, could not be in anyway

considered as actualities in 1942 as to what has actually developed today.

And where are we today? Now we get word within the last week that a plane has done the almost unbelievable thing. If anybody had said this in our youth, that a plane would be constructed and it would travel as fast as sound, he would be looked upon as very much of a queer individual, indeed, and a novelty.

And what has happened since then, since last year? Just within the last few weeks, and while this question was pending, there has been a plane that has traveled twice as [467] fast as sound.

And what are we confronted with today? We are confronted with the thought that in the future there may be planes that will be 300,000 pounds in weight, that will want to take off and land at the San Francisco Airport. We can't conceive that right at this time. Certainly no facilities at the San Francisco Airport today are adequate to accommodate such a plane as has been described.

We have another feature in the industry to show just how changing this thing may be—not only in 1942 when this lease was entered into, but as of today. We read about their harnessing nuclear power, to put those into airplanes. And what the effect of that is going to be.—They are going to put them in such a way, they say they are going to be able to circumnavigate the world three times without stopping. The thing is almost unbelievable.

And on the other hand we have the navy comes in and makes the extraordinary statement that per-



haps there is no need for any land planes any more, that they are developing water planes to such an extent that they will take the place of every land plane that is considered, that is in operation now or considered in the future, and will outfly and outlift anything that has been designed for land use.

The industry in short, your Honor, not only in 1942 was in a much worse state of turmoil than today, but it is even [468] as of today in a terrible state. Nobody knows what the future is going to be.

Now, when I call those facts to your Honor's attention, it is quite understandable how in 1942 when this lease was entered into, that, yes, consideration was given, as is stated in the transcript to the possible development of heavier planes than the 25,500 pound that was then in use for commercial purposes and in use by plaintiff in this action. But nobody attached too much significance to the thought that they were to be in general use and accepted by the industry in general. But it was developed beyond the concept of anybody in 1942 that could have been expected of him, when this contract was—when this lease was entered into.

Now, here is something that I introduced this morning, if your Honor please, and that is Defendant's Exhibit R and R-1, 2, 3 and 4, with the succeeding numbers. That exhibit if your Honor please, is the mechanics that were gone through by the Public Utilities Commission in the year 1941 in setting rates and charges for all carriers who were using the San Francisco Airport.

It might be well to call your Honor's attention

at this point to the provisions of Section 130 of the Charter of the City and County of San Francisco, which, as your Honor well knows, is given the sanctity under constitutional provision and under legislative action as it has been ratified by the [469] State Legislature, or has the dignity, or transcends the dignity, I should say, of the ordinary State Statute in the sense that it becomes the constitution of the City and County of San Francisco.

Section 130 of that Charter recites, referring to the powers of the Public Utilities Commission:

“The Commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of services by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers; and to settle and adjust claims arising out of the operation of the said utilities.

“Rates may be fixed at varying scales for different classes of service or consumption. The Commission may provide for the rendition of utility services outside the limits of the City and County, and the rates to be charged therefor, which may include proportionate compensation for interest during the construction of the utility rendering such service.

“Before adopting or revising any schedule of rates or fares, the Commission shall publish in the official newspaper of the City and County for [470] five days notice of its intention so to do, and shall fix a time for a public hearing or hearings, which hearings thereon shall be not less than 10 days after the last publication of said notice, and at which

any resident may present his objection to or views on the proposed schedule or rates, fares or charges."

Without boring you with reading the rest of the section thereafter, it is provided that after the public hearing has been held by the Public Utilities Commission, the schedule of rates and charges must then be submitted to the Board of Supervisors, who must either approve or disapprove, and it states the number of votes required, and if they don't act on it within 30 days of that time, it then becomes the established rate and schedule.

My purpose in bringing Exhibits R, S and T in this morning and having them introduced, the "R" group covers the fixation of the rates and charges fixed under Section 130 of the Charter by the Public Utilities Commission—which, incidentally, under another section of the Charter is given full control, management of the operation, and development of the airport as well as the other utilities that the City owns.

It first of all, as the exhibits will show, passed its resolution of intention to consider the increase in rates of [471] 1941; directed the Clerk of the Commission to publish notice for the requisite time, as shown in this Exhibit R that was done. A date was set in that notice of hearing in the publication in the official newspaper of when it was to be heard. The hearing was held after the published notice. It was then determined what the schedules were. The schedules were under this Exhibit R for the year 1941. And thereafter it was sent to the Board of Supervisors who confirmed it.

The interesting part about that, Your Honor, is this: That the precise wording as set out in the rates and schedules as determined by the Public Utilities Commission and authorized by the Board of Supervisors are written into the lease that is before Your Honor for contemplation and construction now. They don't change. They are not changed in any respect at all from what the Public Utilities Commission did.

Similarly, in 1946, as Exhibit S and the other numbered pages in it will show, a like procedure was carried out as I have described as in the first instance in 1941.

And again the documents are there showing the procedure that was carried out. The publication, hearing held in 1950 by the Public Utilities Commission, and the action taken by the Board of Supervisors.

I am taking this thing, maybe, the wrong way too, but counsel in his argument has said that there was no notice given to his carrier and his plaintiff in this action that these [472] hearings were to be held. The City has complied with every provision in the Charter, as is shown by this group of exhibits I have given you, and complied with what it is required to do, and it is required to do nothing other. And of course the fact of the hearings to be heard and the rates that were going to be contemplated were made a matter of construction—matter of discussion—obvious that it was, among all the carriers as well as the City before the matter was ever brought before the Public Utilities Com-



mission in conformity with the formal notice that it gave in accordance with the law that governs this situation.

So I thought it might be well to dispose of that problem right off the reel, and I think it is, and the record bears us out completely on that.

Now, of course we have this sad picture to call to Your Honor's attention, and that is, in the transcript I remember reading Your Honor's comment at the time, that apart from the capital investment that the taxpayers of San Francisco have made in this airport, they have been confronted with a \$650,000 loss of operation for the fiscal year 1952-1953, which is the last figures that are complete and presented to Your Honor. \$650,000 loss in just maintaining and operating of the airport itself.

The picture is even grimmer than that. And I thing Your Honor likewise pointed out in the transcript the grimness of [473] it when you asked the question to the effect, "Did that include the payment of the bond interest and redemption of bonds?"

The answer given you wasn't sufficiently complete. It did not, Your Honor, include that.

For the current fiscal year of 1952-1953, in addition to what I have explained in the way of loss in operating, just keeping the thing going, out-of-pocket cost or loss, the interest and the retirement of bonds has cost the taxpayers \$2,130,000.

For what? To allow 12 chartered carriers of airplanes to use the facilities of San Francisco. And

they have the temerity to come before the Court and ask for equity, from their viewpoint, that they are being charged rates and schedules to which they object, and wish to keep frozen in a lease—a situation that they know is wholly inequitable in view of the circumstances of the development of this industry; and when it was likewise known that the City and County and those responsible for the formation of the terms of that contract had no knowledge of what these development might be.

And all these monies in this tremendous \$40,000,000 not expended for the inhabitants of San Francisco. Surely they reap a benefit from it. The people here naturally have the advantage of going to a well conducted airport. That is very fruitful from a business standpoint for all the carriers. They have the advantage of going to that. But they are not the only ones. Everybody that travels throughout the nation and [474] comes to San Francisco, they likewise have the privilege of it.

Now, it seems to me almost—it's a horrible word to use, but it seems there's a hypocrisy in the thing.

When these carriers, and this plaintiff particularly who instituted this suit, when they come before a court of equity and say that they shouldn't pay a fair or just schedule of rates that has been set up by the authorities under constituted law; that they shouldn't be called upon to pay that because they have a contract that they believe should be susceptible of an interpretation that they are trying to put on it, that is strange, and it should

not stand up as a matter of equity in this or any other court.

They say that they should be entitled to those frozen amounts that were specified in 1942. Well, now, it doesn't mean a thing to them, as a matter of fact. They claim that the people who use the facilities really are not the people of the world at large but they are the inhabitants of San Francisco. That is ridiculous to maintain that from the very nature of the business.

Plus the fact that whatever landing fees or take-off fees—and there is only one charge for the two operations—coming in and getting out, we only charge them once for that fee, or to do that.

And by the way, it is obvious when our rates are fixed by [475] the CAA and CAB, they figure in what is the the charge that they must pay to the San Francisco Airport for landing and take-off charges, and that is included in the very ticket and the cost of that that this man from anyplace throughout the United States may come into and use the facilities in San Mateo County.

We are part and parcel, with the argument before Your Honor that we are not a utility down there, seems to me wholly falacious. Let us approach this matter from this viewpoint for a moment, and let's simplify the thing to this extent:

I am here not so much concerned as to the relatively few dollars that are presently involved before the Court, but we are concerned very much about the principle and with the things that may happen for the many years to come. This is not the only

carrier involved. We have another suit pending here that has not reached the stage yet of this action, but the City instituted that suit against the United Airlines and it is in the files here of the court now and will be litigated and carried on, but this was instituted by the carrier itself.

Let's for the purposes of this case forget anything about the area in the Terminal Building. Let's forget about parking space. Let's even forget about tank farms or anything of that sort and let's just consider the area that goes—well, let's take this podium, or whatever we want to call it here to be the end of the City's properties before we get out onto the field itself. Then we come upon aprons, as they call them, or [476] loading zones, taxiways, and finally the runways on which these airplanes take off.

Now, those are all facilities that are used in common with all the other carriers. And those are the facilities, to shorten this case and to give Your Honor an easier way of approaching this already complex problem, of determining, does the City and County—and I think Your Honor stated this in the transcript, that that seemed to be the crux of this case,—does the City and County of San Francisco have a right to fix schedules and rates of charges for those common facilities of the loading zones, the taxiways and the runways, and fix them from year to year in view of this particular plaintiff having a contract or lease that says their rates shall be fixed in accordance with the 1941 rates and charges.



And I think that will simplify the situation very well. That where a common carrier—that where a utility and a part of the common carrier, no different from this railroad company with its railroad station, if anybody is injured there, certainly the railroad company within its own properties would be held liable. If the City and County of San Francisco or one of the carriers, I should say, there at the airport happened to have a patron, one of their passengers, from the time they left this administration building, went out to the apron or loading zone, something happened to that passenger, he tripped or fell or was injured, just as sure as we are in this courtroom [477] this morning that passenger wouldn't be suing TWA, but they would be suing the TWA and the City and County of San Francisco, for any dangerous, defective condition of that approach to the plane.

And further than that, when that passenger gets into the plane and they have sealed him off and are ready to start off, they taxi over to the runways. Now there's a person boards it there to use the facilities of the City and County of San Francisco. It's out there on this taxiway now. The motor is going. They are proceeding along the taxiway to the runway, and something happens, and there is an obstruction in the concrete, taxiway, or something might happen that they went off the side of it, and a hundred and one things that could happen. Just as sure as we are in this courtroom, we in the City and County of San Francisco would be in on that situation and we would be named a party de-

fendant and would be held jointly liable as a joint tort seizure.

And the same thing would happen with that plane as it gets out on the runways, and before it leaves the ground itself. Anything that happened on those 8,900 feet of runway, if they were using that particular runway, the City and County of San Francisco would be a joint tort seizure under those conditions.

Yet plaintiff tries to say we are not operating a utility insofar as common utilities are concerned. I think [478] that clearly illustrates, should illustrate, Your Honor, that it is in fact a utility.

That being so, the City has followed out from the exhibits you have had brought to your attention this morning what is required to fix the rates and charges. And then we will get into the proposition of saying, once having entered into the terms of the lease, may then the City change those terms by these subsequent charges and rates that are fixed up in the rate schedules? And we will come to that.

I will try to follow as much as I can counsel's argument this morning. He followed more or less, I think, the order of his brief.

Those cases in the first part of the first section of his brief all go to the proposition——

May I ask Your Honor what your pleasure is?

The Court: We will take an adjournment until 2:00 o'clock.

(Thereupon this cause was adjourned to the hour of 2:00 p.m. this date.) [479]

Mr. Holm: If the Court please, I did not realize

that I had taken so much time this morning trying to develop that whatever equities exist in this case in the Court's interpretation of the documents should be in favor of the City because of all the circumstances—the money invested by the City, the conditions under which it was invested; and then the second point that we are in fact conducting this airport as a utility.

One of the corollaries of a utility is that there must be regulation of it to a certain extent somewhere along the line, and by the actions of the United States Government through which the Department of Commerce as represented by the Administrator of Civil Aeronautics, the San Francisco Airport does in a sense become regulated as a utility. As an example of that, I call your Honor's attention to an order; it is called a Technical Standard Order, entitled TSO-NC6-A, and the subject of it is "Runway Strength and Dimensional Standards for Air Carrier Operation." It reads in part:

"In order to obtain better correlation between the design of airports and the design of aircraft which are to be used in the air carrier operations and design standards contained therein have been [480] developed by the Civil Aeronautics Administration."

And then it goes on to say what the purpose of it is: It is to be a guide and the norm by which airports are to be constructed. And the various airports throughout the nation are listed as feeders, trunk lines, express and continental and intercontinental, and intercontinental express. And in that last category the Civil Aeronautics Administrator

dictates that to reach those requirements, a public utility, as the airport is, must have a runway of at least 8,400 feet—your transcript shows that San Francisco Airport exceeds that—a width of 200 feet—we show that we have that in the transcript—and a taxiway width of a hundred feet, and that is likewise met in our structure at San Mateo County. And with that they permit dual wheels with a pavement loading of 125,000 pounds.

So if we did not have those facilities that have been specified as I have read from the Administrator of Civil Aeronautics in his formal order, this plane would not be permitted, or any similar to him, to use the facilities of the San Francisco Airport.

So in a sense, to have them there, we are regulated by the rules and regulations of the CAB—Civil Aeronautics Board—and the CAA—Civil Aeronautics Authority, and we must live up to them if we care to continue in business.

I will try to be as brief as I can to pick up counsel's [481] argument of this morning. He followed the order of his brief.

In Section 1 of his brief he quoted cases and tried to establish the right of the City to lease airport property. We have no quarrel with that at all. We agree to the statement and to the cases that he has in there. It is a very lawyer-like preparation and done well. He sets out the cases in very good order and we have no quarrel with it. It is quite in conformity with what we believe is the law.

But he makes reference to the Municipal County



Airport Law, statutes of 1947, Chapter 267, page 487, Deerings General Laws of the State of California. But he forgot to emphasize this language here: that when the State act permits a municipality to acquire an airport outside of its confines or geographical limits, it also entitles them, quoting from the Act, "to require payment of charges, fees and tolls together with liens to enforce payment."

Counsel has referred on his first point to the case of *Pipes vs. Hilderbrand*, 110 Cal App 2nd 645. This involved a writ of mandate to compel the Commissioner of Finance of the City of Fresno to issue a warrant for the first installment of payment of a contract of work to erect a hangar at the Fresno Air Terminal. We have no quarrel with that at all. Of course we say the City has a right to do that in its capacity as a municipality.

And the same about *Laurent vs. City and County of San [482] Francisco*—I tried that case in the court below. And there again that has nothing to do with the leasing of common facilities such as I described, that go beyond the barrier of the actual physical properties, as of course a terminal building and those things that are used in conjunction with it. And I have no quarrel with that, naturally, as we prevailed in that case.

But again, that has nothing to do with these properties that are used in common with all the other carriers, which are, I believe, 12 in number in addition to the plaintiff in this case, and there is a Japanese line and some other foreign line about to come into San Francisco.

And then they would be confronted, Your Honor, with this situation that outside of the three carriers that I believe I mentioned this morning, all other carriers would be paying discriminatory rates, which is a violation of every concept of any rate schedule that has ever been put into effect. It is all supposed to be based upon a uniformity of rates and no differential to be given or preference given to anybody who is using the utility. That is the fundamental law that goes from the Supreme Court down to our lowest court of rate making and how it should be established.

And here, by a court lending itself to the interpretation which the plaintiff seeks, you would be destroying that very fundamental of rate making which would upset and allow [483] discrimination to exist among the carriers and give three carriers a preferential rate in their business activities over all the others. That is not a concept legally to be tolerated nor is it equitable in any sense at all.

Section 2 of the plaintiff's brief has to do with the airport operated and administered by the Public Utilities Commission and it acts in a proprietary capacity; that agreements made by the Commission are governed by the rules of law applicable to private corporations. Well in the main, we have no quarrel with that point. We can adopt that point as they state it. But in any of the cases that counsel refers to in his brief on that point, he has yet to point out a case where they were common use facilities such as the apron, the taxiway and the runway

at an airport, or anything that could be construed as an analogous situation.

Ex Parte Houston I think is one of his cases, 224 Pacific 2nd, 281. It involved the validity of a contract with an airport limousine service for an exclusive concession to pick up and deliver passengers to and from space in the terminal building and the paving area. Those are all things that we say are susceptible to lease.

Another case that he laid emphasis upon was Pignet vs. City of Santa Monica, 29 Cal App 2d 286, which involved an accident at Clover Field, an Airport owned by the City of Santa Monica. And it was held that the City operated the [484] field in a proprietary capacity and "as such was liable like and only like any other individual for damages and injuries caused by its negligence."

To the same effect was the Miami Beach Airline Service vs. Crandon in counsel's brief. An exclusive concession was given to a transport company to convey passengers back and forth. Again, it is not a common facility such as I have described.

The same may be said of Milwaukee County vs. Town of Lake, 48 Northwestern 2nd, page 1. [485]

Again, that was not a common facility where they leased merely a hangar and a strip of land close by it. It is not these parts of utilities that are leased as common utilities used by all of these other carriers in conjunction with plaintiff in this case.

The Milwaukee case was one that was given considerable space in counsel's brief.

The next one was Arkansas Valley Company vs.

Morgan at 229 Southwestern 2nd. The same thing applies there. A building known as Building No. 19 and a contiguous strip of land was leased. Again that is not property or facilities that are used in common with others.

In Section III of the brief—and we are making progress, Your Honor—plaintiff comments on the analogy between wharves and airports. He quotes from the case of *Coleman vs. City of Oakland*. This case involved an action for personal injuries allegedly caused by a motor truck operated by defendant City of Oakland at the Municipal Airport. He quotes at length from this case, but it is very significant that in his quotation from this case on page 22 of his brief that he leaves out a highly important quotation that would apply and substantiate the position we have taken in this case. And I am going to read the few lines that he omitted before he began quoting. His quotation is from *Coleman vs. City of Oakland*, 110 Cal App, 715. That is to be found on page 23, line 10 of his brief, [486] and he quotes this language:

“Its nearest analogy is perhaps found in docks and wharves. ‘An airport with its beacons, landing fields, runways and hangars, is analogous to a harbor with its lights, wharves and docks; the one is a landing place and haven of ships that navigate the water; the other of those that navigate the air.’”

And then he goes on and quotes some citations, but that is the end of the quote. But just preceding that in that opinion, which counsel very properly



from his own standpoint failed to incorporate, is this very prophetic language, and I am quoting it verbatim. It is on page 720:

“We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity. An airport falls naturally into the same classification as such public utilities as electric light, gas, water and transportation systems which are universally classed as proprietary.

That, I think, while it is dicta to the determination of that case, nonetheless is quite indicative of counsel's carefulness in avoiding bringing anything of that to the Court's attention, which I believe is the only language that has been used in any California case to actually and specifically state that an airport is a public utility. [487]

That being so, of course the thing obviously follows that if it is a utility we have under our Charter the right to regulate rates.

Another case that counsel emphasized in his brief under this point was *Femmer vs. the City of Juneau*, 97 Fed 2nd, 694. There is language in the case which indicates that rates for wharfage may be fixed by contract by a municipality which owns a municipal pier. But the lease involved in that case, however,—plaintiff doesn't mention this either—fixed a set price for each boat to approach the wharf using the Juneau pier, but rates for dockage or wharfage were fixed by schedule, which is about the situation that we have here.

And again the only other case that he cites on the point would be *MacNeil vs. Chicago Park Dis-*

trict, 82 Northeastern 2nd, 452. That is a case that held that a dock fee set by the Park District of Chicago was valid for vessels which moored within its jurisdiction even though Lake Michigan is considered navigable waters and cannot be burdened by local regulations. There is nothing in that case but a contract under which the matter of fees is set by lease. So the case does not apply and is no help to plaintiff.

I reluctantly bring attention to a case which Your Honor sat in in this court, in a Three Judge Court, *The State of California vs. United States of America* which involved dockage fees which the Maritime Commission charged back there, I guess [488] it was during the war times. And there again it substantiates the very theories that I have suggested here. The citation of that case is *State of California vs. United States of America*, 321 US 576. That case inferentially sustains just the position that I am taking here: That we have the right to fix fees for the use of the facilities such as has been done here.

The Court: I am not conscious of that case. Will you elaborate a little more.

Mr. Holm: Let me see if I can remember some of the facts. It was a case that involved the United States Maritime Commission and you, I think, and Judge Healy—I think Judge Healy was the one who wrote the opinion—and another Judge I don't remember now—sat as a Three Judge Court. The case involved the right of the United States Maritime Commission to make an order requiring water-

front terminals to desist from unreasonable allowance of free time during which time cargo may rest on the wharf without charge against public owners of wharves and piers. The Supreme Court upheld the decision of the District Court that such order was valid. Does that bring it back a little bit to Your Honor now concerning public owned docks?

The Court: Yes, but I don't see how it enters into our problem here.

Mr. Holm: Let's read this little excerpt from it.

"Through its Board of State Harbor Commissioners, [489] California provides facilities for the handling of freight and passengers on the San Francisco waterfront, under a statute which prohibits the Board from making charges beyond the cost of furnishing such facilities and administering them. California Harbors and Navigation Code is the citation. Pier and office space is assigned by the Board to various steamship lines, and charges fixed by the Board are collected by these assignees for the Board. Except at two piers, the assignees handle the cargo, but the Board employs a staff of men to check all cargo and vessel movements and collect its charges. Oakland, through its Board of Port Commissioners, operates piers and terminals which like those of California, are designed to accommodate vessels in coastwise, intercoastal, offshore, and foreign trade. Whether the facilities are operated by the City directly or leased to another, the City prescribes and collects the charges."

That is the point that I am trying to bring out here: That there the City really prescribed by rates

what the charge is to be and actually was collecting them, such as it does here: The City prescribes them through the action of the Public Utilities Commission confirmed by the Board of Supervisors and [490] collects them.

Another case of interest is the City of Oakland vs. Eldorado Company, 41 Cal App 2nd, 320. There, the company maintained a public wharf, and the Court stated as follows, at page 325 of the opinion:

“If the property involved is held for public use, but is usable by the public generally, with a charge, such as a toll paid for such use, it comes within the classification of a public utility and permission, generally in the form of a franchise from governmental authority, is necessary. The operation of this wharf, and the taking of tolls, as appears from the stipulate facts, brings it within the category of a public utility.”

That is rather cumulative of what I have said this morning in trying to emphasize that we are in fact a public utility.

Section IV of Plaintiff's brief is entitled “The Airport is Located Wholly Without the Municipal Boundaries of San Francisco.” And it is said that a municipality may not exercise anything in the way of police power beyond its geographical limits. Counsel, during the course of the trial, as I read the transcript, seemed to lay emphasis upon the fact that San Francisco in any of its properties located in San Mateo County may not make an arrest and seems to give that as an example that that was the exercise of police power. That is [491]



not the concept of police powers as we consider them under the constitution. Counsel is quite right in that situation, and I had to evolve that situation in which our employees in San Francisco who acted as guards at the San Francisco Airport would be deputized as deputy sheriffs of San Mateo County and consequently could make an arrest if it were necessary to preserve order, which is wholly necessary when you are handling three and a half million people a year.

The police powers go way beyond that, and rate making is one of the police powers that is conferred upon a municipality.

I believe counsel quoted from *South Pasadena vs. Terminal Railway Company* in 109 California 319. But that case really has no bearing on this situation here and I don't know why it was included in the brief excepting that it did go on the question of the right to fix rates and probably redounds to our benefit because it upholds the right to fix rates and street railway fares from one community to another, between South Pasadena and Los Angeles, and that in effect gives the authority that there are extra territorial rights that inhere in a municipality when they operate a utility outside of the confines of the municipality. Your Honor is very familiar with that. You have had the celebrated *Pacific Gas & Electric Company* under your tender mercies for a good many years, against the City, where power was involved and its companion [492] of water distribution. And obviously there you knew how it was necessary that San Francisco do estab-

lish its rates, especially when it delivers water outside its geographical limits, and how necessary that was. I will not say what the ultimate ruling was on that case; it is too well known to your Honor and to me. However, that is part of it. And of course it would be preposterous to assume that the state law which says that you may build an airport in Siskiyou County, period. What would be the sense of that, unless, inferentially you were given the right that you could impose fees for common facilities that naturally flow from it.

In addition to that, of course we have in our own charter a provision under Section 130 that we must establish fees for the use of these utilities. And I emphasized that, I think, more in detail this morning.

There is a case of *Ebrite vs. Crawford*, 215 California 724. That was decided in 1932. That case involved a collision between two airplanes at the Long Beach Municipal Airport and the plaintiff sued the defendant for personal injuries and property damage.

There was an objection on appeal to certain instructions, and the respondent justified the instructions on the ground that they were the substance of an ordinance of the City of Long Beach which provided for a right of way and other rules for the operation of the aircraft. Appellant relied on this [493] contention: that the accident occurred outside the city limits of Long Beach, the easterly city limits being westerly of the point of a narrow portion of the field where the machines collided.

Well, it is not too long; I will read just a short excerpt from that case at page 7 to 8:

“This argument of appellant cannot be sustained for the reason that the City of Long Beach had extraterritorial power necessary to regular and lay down rules governing the use of the municipally-owned airport, lying partly within and partly without the City. By act of the Legislature approved April 28, 1927,—” the very act that counsel has referred to, “—California municipalities were authorized and empowered to purchase, lease or otherwise acquire lands for and to operate airports or flying fields and in connection therewith ‘to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport’. In addition to the implication which necessarily flows from the quoted language of the statute it should be observed as is said by the Supreme Court in *In Re Blois*, 179 Cal 291: ‘\* \* \* Municipalities may exercise certain extraterritorial powers when [494] the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality.’ And it requires no great meditation to realize how strange an anomaly it would be to say that the City might own an airport adjoining its boundaries and yet be without the power to regulate the manner of its use. For other statements of the right of the City to exercise extraterritorial jurisdiction when necessary to the proper conduct of its affairs—” and then it goes on to some other cases.

Section 5 of Plaintiff's brief is entitled that "the City has the power to fix public utility rates by agreement for a definite term, and the rates so fixed cannot be increased during that term." Well, that of course goes to the essence of what is provided in the 1942 lease. The rates in the 1942 lease, as I told Your Honor this morning, verified by Defendant's Exhibit R in this case, are strictly in conformity with the rates and schedule of charges for these common properties that are used by all other carriers and are incorporated right in the 1942 lease. Of course that is sufficient notice, I should think, to put the plaintiff on complete notice that it is subject to regulation and that the whole use of those common facilities at the airport is subject to regulations. [495]

As I understand, Mr. Andrews could not recall that he was aware of any enactment in 1941 by the Public Utilities Commission or that mention had not been made of existing fees. It seems to me that must be just a lack of memory on Mr. Andrew's part, because how else could there ever be verbatim put into the lease of 1942 those very rates and schedules that were set up by the Public Utilities Commission, confirmed by the Board of Supervisors after public hearing in 1941. I am not decrying the effectiveness of Mr. Andrews as a witness or as a gentleman, but it is just one of those things that he has forgot, apparently, over the many years that have intervened since that lease has been prepared. But there it was, written into the lease.

Counsel maintains that we have the right to fix



fees and to carry them on indefinitely. That is not so, as a matter of law, I respectfully state to the Court. The only time that that can be done is where there is a specific provision in some charter or in some act that would permit such a thing to be done, and then it might become a binding contract, but not under all conditions.

In distinction to the cases that he has cited here, we are confronted with this situation: That not only do we not have anything that will permit us to go into a firm contract for rates for these common properties extending over a period of years, but we have an inhibition in it, and that is that [496] Section 130 of our Charter that advised us—and I read it to you this morning:

“The Public Utilities Commission must fix rates and schedules of charges for all utilities owned by the City, both within and without the City and County.”

That is paraphrasing the language of the forepart or middle section of 130 of the Charter, but in essence it is what it provides. So there you have a direction inhibition, and any of the cases that counsel may have cited, and he has a few here, that says that where there is statutory permission to make such an agreement that there it may be sustained; but that isn't the case before Your Honor. The case before Your Honor is that there is an inhibition. A charter, as Your Honor well knows, is a designation of limitations of power upon a city, and you may not deviate from those when they are specified in the charter. And in the charter in this

instance, Section 130 tells you as I have just related: That you must fix this schedule of rates of all utilities whether within or without the City and County of San Francisco.

I think, really without taking up too much of the Court's time on that, that we can let that be considered as a sufficient answer and a sufficient distinction to these cases that counsel has cited.

I am trying to lay my hand now on another case I should [497] like to call the Court's attention to. This case of *St. Cloud Public Service Company vs. St. Cloud*, 265 US 352, might be worthy of a little consideration, if Your Honor please. This is an action brought by the Public Service Company to enjoin the City of St. Cloud from interfering with a proposed increase in the rates charged for fuel gas. In 1905 the city by ordinance granted a franchise to the company and authorized it to sell its fuel gas at the rate of \$1.30 per thousand cubic feet. The city refused to entertain a petition prescribing a rate yielding a reasonable return on investment, the company claiming that a rate of \$3.39 per thousand cubic feet was necessary. The company increased its rate accordingly and brought the suit to enjoin the city from interfering with the proposed increase.

The city claimed that there was a valid existing contract between the city and the plaintiff company governing the maximum rate for fuel gas. The District Court dismissed the company's bill to enjoin. This decision was affirmed by the Supreme Court. This decision does hold that, under the cir-

cumstances of the case, a contract fixing public policy rates was a valid one.

The Court construed a provision of the St. Cloud Municipal Charter, Section IV, providing in part as follows; quoting from the charter:

“The common council shall have full power [498] by ordinance to provide for and control the erection and operation of gas works, to grant the right to erect, maintain and operate such works, provided that the common council shall have the authority to regulate and prescribe the fees and rates and charges of any and all companies hereinbefore mentioned.”

The Court stated, in construing the charter provisions it would look to the decisions of the Supreme Court of the State of Minnesota. And then the Court considered two cases of the Minnesota Supreme Court and states as follows, 265 US, 359, 68 Lawyer's Edition, at 1055, column 2:

“In the light of these decisions of the Supreme Court of Minnesota”— this is our Supreme Court speaking— “—of the State of Minnesota we think it clear that the city had authority, in 1905, under its charter and the laws of the State, to enter, by ordinance, into a contract, in its proprietary capacity and for the benefit of its inhabitants as well as itself, providing for the construction and operation of gas works for a period of 30 years and fixing the rates to be charged for gas sold to it and its inhabitants. This power existed, under the doctrine of the Reed Case, [499] under the provisions of the charter giving the council the power to pro-

vide for the control and erection of gas works for the purpose of supplying the City and its inhabitants with heat and light. And we do not think that this contractual power was limited by the proviso that the council should have the right to 'regulate and prescribe' the rates and charges of the companies to which it might grant the right of constructing such works. It is true that, standing alone, this proviso, in the absence of any State decision to the contrary, would, under the construction given similar language in *Home Telephone Company vs. Los Angeles* and be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provision of the charter authorizing the City to contract as to rates."

That was referring to the *Los Angeles* case.

"And in the present case, as the other provisions of the charter gave the City authority so to contract, we must regard the proviso as merely an alternative provision; that is to say, we think [500] that the City might either contract as to the rates, as an incident to its power of granting the right to construct and operate the public utility, or, if it did not exercise this power to contract, might thereafter 'regulate and prescribe' the rights in the exercise of the governmental authority conferred by the proviso. One power, however, is not destructive of the other. And where a municipality has both the power to contract as to rates and also the power to prescribe rates from time to time, if it exercises



the power to contract, its power to regulate the rates during the period of the contract is thereby suspended, and the contract is binding.”

A clear expression of the rule following the Home Telephone Company vs. City of Los Angeles case is Railroad Commission vs. the Los Angeles Railway, found at 280 US, 145, 74 Lawyer’s Edition, 234. In this case the Los Angeles Railway Corporation brought suit to abrogate rates fixed by its franchise from the City of Los Angeles. [501] The District Court of the Southern District of California held the fixed rate provision of the contract or franchise invalid. This was affirmed by the United States Supreme Court.

The Los Angeles Railway Corporation operated in Los Angeles under a number of franchises with the City which provided that the rate of fare should not exceed five cents. The franchise was granted between 1890 and 1918. In 1926 the Los Angeles Railway Corporation applied to the Railroad Commission for authority to increase the basic fare to seven cents. In 1928 the Railroad Commission denied the application, and the Court had the following to say—this is our Supreme Court:

“The sole controversy is whether the company is bound by contract with the City to continue to serve for the fares specified in the franchise—it being conceded that the finding below respecting the inadequacy of the five-cent fare is sustained by the evidence. Appellants contend that at all times the City had power to establish rates by agreement

and that the franchise provisions constitute binding contracts that are still in force. On the other hand the company maintains that the State never so empowered the City; and it insists that, if the power was given and any such contracts were [502] made, they have been abrogated.

"1. It is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. \* \* \* And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. \* \* \* And, in such case, the Courts may not relieve the utility of its obligation to serve at the agreed rates however inadequate they may prove to be.

"This Court is bound by the decisions of the highest courts of the States as to the powers of their municipalities."

And then cites cases.

"Our attention has not been called to any California decision, and we think there is none, which decides that the State Legislature has empowered Los Angeles to establish rates by contract. This Court is therefore required to construe the state laws on [503] which the appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the State from time to

time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the State to authorize the bargaining away of its power to tax."

And that is the end of the quotation there.

In short, there are certain circumstances where a municipality may have its powers of fixing the necessities of health and welfare of the public at large and where there are those that can be just as active in an adjoining county that that may be suspended for a limited time, but under the decisions that I have given Your Honor here there must be clear statutory authority for that very purpose, and they are not looked upon with favor from the quotation that I have just given you.

However, we are not even in the predicament of trying to determine that in this case here because, as I have pointed out before and reiterate again to Your Honor, that Section 130 of the Charter of the City and County makes it mandatory upon the City and County to prescribe rates for all utilities that [504] it owns and operates both within and without the City and County of San Francisco, negating anything that may be implied in the right to enter into a contract that would transcend that power. That is a limitation of the powers of the City. It cannot go beyond those prescribed state-

ments that are contained in Section 130 of the Charter.

Of course, to show how a municipality may act when it is fixing rates, we will respectfully call your attention again to the case of *Connett vs. City of Jerseyville* (C.C.A. 7, 1940), 110 Fed 2nd 1015, and this is a brief excerpt from it:

“The governing body of a municipality, when fixing utility rates or charges, is performing a public function of the municipality and acting as a rate-making body as distinguished from its private function as owner and operator of the utility.”

That in a measure upsets the argument that counsel made this morning and in his brief that this is a unilateral attempt upon the part of the City to set rates and charges for these utilities that are used in common with these other carriers who pay a different rate than we seek to impose upon plaintiff in this case.

The sixth part of the brief of counsel is given to commercial frustration.

Of course, I guess none of us when we were in law school [505] were given that doctrine of commercial frustration, and it wasn't until about seven or eight years ago that I encountered it for the first time in a decision—I think counsel mentioned it this morning, somebody against *Murphy*—in a case which arose in Los Angeles where a man had entered into a contract, what he thought was an advantageous lease for premises to conduct some sort of an automobile agency and repair shop and one thing or another, and as counsel said this morning,



automobiles were no longer available. In addition to that, if I remember that case, the State of California came along and built a roadway in front of his establishment and made it impossible for him to conduct his affairs, I believe. That is the case, and that is the first mention of commercial frustration that has entered into our laws in California.

The Court: Do you think that it enters into this case?

Mr. Holm: Pardon me?

The Court: Do you think that it enters into this case?

Mr. Holm: I think it does. I think it is worthy of the Court's consideration.

The Court: I call that to your attention because I wasn't impressed with it. Now I may have made a casual reading.

Mr. Holm: No; I think that it is worthy of very careful consideration for the reasons that here we entered into [506] contracts in 1942, as I explained this morning when aviators, to use that expression again, were flying by virtue of the seat of their pants, the thing was in such infancy. And I use that expression because it is so illustrative of this entire industry as compared to today where they have a series of instruments in front of them that requires about six or seven engineers to decipher which button should be pushed for what purpose, and I guess they have to have an engineer, almost, to read one of them. That is the way the development has progressed. Nobody dreamed in 1942—certainly, they talked about something that was

huge and was going to happen; the Army had these secret machines that were going to come in and use the airport. Nobody knew of the thickness of the pavement. How could Mr. Doolin or how could the Public Utilities Commission of the City and County of San Francisco five laymen sitting up there, or Mr. Cahill who was then Manager of Utilities and Mr. Turner now—how could they envision in the future that the bringing in of heavy planes continuously, not a little operation now and then or a few planes maybe a day, would disrupt the pavement that they had on their runways and on their taxiways and on their aprons or loading zones? [507] No, a few operations of that sort they all agree would not have done much harm and didn't when Army came forward with a few of those planes and did use it with fair regularity during World War II. But nobody at that time entertained the slightest notion that the air companies would ever have for transportation these huge planes that are now a reality.

And that is borne out again by what I said this morning. That is something that no reasonable group of men could have anticipated, and that is one of the rules that is set down on this idea of commercial frustration that is pointed out in the decisions that uphold it and say that it is a valid defense to certain written documents and certain impositions made upon contracting parties. And it is something that has entered into our law and is very definitely in here, and in this case I believe it does apply for what I have told you because of

the situation. As I say again today, where on earth do we know we are going with the aviation industry at present? Navy claims there is no need for land planes virtually any more with the way they have progressed. They have made advancements, and it is all supposed to be top secret information, although it was brought out a little bit in our bridge hearings before the United States Board of Army Permits and Board of Army Engineers. The prospects that they have would be unbelievable if you would—were to give credence in detail to everything they say to you and you might [508] as well fold up your airports. It makes a city like San Francisco feel apprehensive after investing all these many, many millions of dollars of the taxpayer's money to say that maybe there is going to be no use for that, because if Navy is right in their views and they so perfect their engines, as they claim they have done with these little things they call the dot that now can keep water out of the engines and out of the fuselage and everything else and they can skim over the water at tremendous speed and get going I guess about as fast as sound—and now they have not only on the board but they claim in actuality these huge water planes that are going to outlift and outmaneuver and travel longer distances than anything they have on land. I say the industry is even in a state of confusion now. And that is recognizable, and everybody is aware of that.

Now just imagine and transport yourself back to 1942. That is 10 years back, or more than that

now. There was even more confusion existing then. So here were honest people getting together for an honest purpose. There has been no chicanery, thank God, in this case on either side. It is just one of those situations that could not be anticipated by either side.

But I want to say in connection with this too that don't forget that in this lease it is provided that this lessor, the plaintiff in this action, TWA, will be given the right to use [509] these common facilities in common with others and never at any greater cost than that of those others who may use it. If we just imagine the reverse of this situation, while we are on this theme of commercial frustration and how their minds must have been not at meeting on anything that was concrete to meet, as they now say for the future 300,000 pounds, a rebuilding of all that airport down there to accommodate them. That is not feasible. Are we going to say that we are going to now expend another \$40,000,000 to accommodate Mr. TWA's passengers and ours because we use it in common so that they may have the facilities of that airport, without their putting anything into it and using the taxpayer's money for it? It is not equitable; it isn't fair, any more than it is fair to say that what we had in mind in 1942 was the reasonable use of 25,000 and 54,000 pound planes to come into there and that it would not disrupt our pavement, and then the heavy ones came and they did disrupt it and we had to go out and rebuild.

Why, the minds didn't meet as to what they were



going after. It is commercial frustration as the decisions have defined it and as I see it, because this science has so progressed from the day they entered into that contract up to the ensuing few years that it has changed the picture entirely. And looking forward, doesn't it appeal to Your Honor that it must be ridiculous to think that we would be ready for weights of 300,000 pounds, and that would mean now a third rebuilding [510] of that airport down there, at the Lord knows how many more millions of dollars of taxpayer's money.

And we are going to litigate with the other carriers in this matter, you can rest assured. We have one suit on file now to be relieved of this onerous and we feel inequitable and illegal provision in the lease. And we are going to do that with the three because they are not there and they are not just, they are not reasonable.

What do we do? We sit back and we put the burden of making up some of the \$650,000 deficit in operating expenses on 10 other carriers that use the place. That puts these three people or three corporations in a preferential group and does something contrary to equity and contrary to what the Supreme Court of the United States and you, Your Honor, have ruled that rates must be reasonable, they must not be discriminatory.

And if Your Honor were to give the interpretation the plaintiff seeks in this case, you would be lending yourself wholeheartedly to the proposition that you would be allowing discriminatory rates to stay in effect and to give these three carriers who

have contracts the preference over other operators in it.

All these things come into this question of commercial frustration. And of course if you bear in mind the future as well when you are considering this case as a fact and realize what would San Francisco do and where would we be when we have [511] to rebuild again. There wouldn't be any airport, at least that would accommodate what the Civil Aeronautics Authorities say would be the required load, 300,000 pounds.

The Court: What does the City of Los Angeles do with their Airport? I don't know anything about the history of that.

Mr. Holm: I have got enough troubles here, if Your Honor please, in our own courts. I know that in Los Angeles they have one that is privately owned and one that is owned by the City.

And of course I don't know this to be a fact; but when counsel says he has 51 cities in which this interpretation of this Court will have effect, I think upon investigation of those 51 cities he will find in many of them they are paying the direct schedule of rates and are not tied with any contract. I don't know that, but I am saying that and I probably shouldn't, because I haven't the facts at hand.

I would rather not pay any attention to Los Angeles. It is difficult enough to try to take this tremendous losing enterprise and burden on this city and bring it up.

The Court: I don't mean particularly Los Angeles; I mean other airports throughout the coun-

try. There has been no case cited. You come to this court and tell me there is no precedent for me to follow.

Mr. Holm: That is right. [512]

The Court: And all of these activities are going on and here I am helpless.

Mr. Holm: You have the distinction, Your Honor, of making law.

The Court: Isn't that ridiculous?

Mr. Holm: It is, Your Honor. It will be the destiny for the cities and the welfare of the people throughout the nation versus the claimant here.

The Court: I hope we haven't another Hetch Hetchy case.

Mr. Holm: Well I hope not.

The Court: I am afraid that we have.

Mr. Holm: I don't think so, Your Honor.

The Court: And I say that advisedly and kindly.

Mr. Holm: Well, we go on now to Section VII, if I may, of plaintiff's brief.

The Court: You may. [513]

Mr. Holm: They state in their brief that "If the charges provided in the lease are public utility rates there has been no valid regulation of the rates heretofore paid by Trans World Airlines. No recovery can be had of charges applicable to a period prior to the date of filing the cross complaint." That is their contention on the seventh part of their brief. I don't think it requires anything further in the way of answer that we have to make other than that contained in our brief on Point 7. I laid emphasis upon the others because counsel said that

we neglected in our brief to answer Points 2, 4 and something, I forgot what it was. But they are answered, as he later on concedes, at least inferentially in some of the points, and I think that we cannot do other than review again what we have said.

The Public Utilities Commission in this case, no officer of the City and County of San Francisco, no group of officers can ever take away the police powers that are vested in the City as such to prescribe rates and charges for utilities as is stated for them in the Charter and which they must follow. That is a doctrine of limitation and they cannot go beyond that. And Section 130 is mandatory that they do just precisely what they have done in this case and what they have made provision for in the contract insofar as contracting away the rates is a nullity. The rest of the contract, insofar as it may apply to the real properties involved, the [514] use of the terminal building, the use of the hangar and use of the area directly in front of the hangar—those are all proper objects for leasehold interest and to be sustained by the Court. But any of those common facilities that are operated outside of the line of the terminal building,—the aprons, the taxiways and the runways—those are common facilities that are used by all carriers. The Court must not have in mind that this is a certain little area that these people are only confined to. This whole area is occupied by 13 now it is, I believe, or 12 common carriers, air carriers, flying in there. They use the runways in common and use the taxiways and use



the loading zones, which are called the aprons as well. They all use them and they are in there. If this was sustained, you have the unconscionable situation that one airplane standing alongside of the other owned by a different company—that that would impose a rate higher on one than it would be on the other, and therefore would put that man in a position, the one that had the preferential rate, in an unfair position for competition with the man who has the higher rate. It is not conscionable. It isn't equity and it isn't legal, because rates and charges must be uniform and not discriminatory. That is fundamental of our Supreme Court decisions and the decisions of this Court many times throughout the years.

I am very grateful to Your Honor for the time that you [515] have allowed us in making our presentation, and we trust that you will see fit to give very careful consideration to our views.

The Court: I assure you that I will.

Mr. Holm: Thank you, Your Honor.

The Court: We will take a recess.

(Short recess.) [516]

Mr. Dyer: If it please the Court, Mr. Holm's argument adverted to the fact that the City, subsequent to the execution of this lease, improved the airport at great expense to the City and County of San Francisco.

Now, it isn't my understanding that, as a principle of law, improvements made by a lessor after a validly executed lease, is a basis for avoidance of obligations under that lease. I do not believe that

the improvements, voluntarily made by this lessor at the San Francisco Airport, have any bearing on the legal issues to be presented to Your Honor. I think essentially the question in this case is whether or not the obligations contained in this lease, admittedly openly and honestly arrived at, are binding upon the parties.

If we were to accept the conclusions which are implicit in Mr. Holm's argument, any lessor who made a lease with a lessee could at any time thereafter, by the simple expedient of undertaking to improve the property, voluntarily improve it, improve the lessee out of his lease. And thus it can be seen, since that is the logical extension of Mr. Holm's argument, that it should have little consideration.

Now, I might also say this to Your Honor; that the concern of this airline in this case is not primarily with the number of dollars it pays the City and County at the San Francisco Airport. Our concern, Your Honor, is with the maintenance of the principle that if we arrive openly and honestly [517] at an agreement with the City and County concerning the operation of an airport, that we should with some certainty be allowed to rely on the obligations contained in that lease for its term.

We have advanced that argument to the City from time to time and have been met with the adamant statement that they, under their public utilities powers, as alleged, can at any time destroy the obligation contained in that lease.

Now, I don't wish to go over again, and I will

not, all the evidence which bears upon this so-called defense of "commercial frustration". I did note, however, Mr. Holm's descriptive phrase at the time in 1942 the pilots were flying by the seat of their pants, indicating at that time aviation was in a formative and simple stage and has progressed to a very complicated stage since then.

Well, of course there has been progress, Your Honor. But may I state that in 1940, two years before the lease, there were in commercial operation the Boeing Stratoliners which were used for a long time thereafter. And there was in production in 1938, four years before the lease was executed, the very planes we use at the San Francisco Airport today—the Lockheed Constellations.

So those same planes were in production and in certain places in commercial operation at the time and before the execution of the lease. [518]

Now, there has also been discussed in the City's argument the fact that the fees and charges for the use of facilities at the San Francisco Airport are fixed charges, included in the 1941 schedule of rates and charges.

Well, of course Mr. Doolin, the Airport Manager, apparently didn't know anything about that. At least, that was the purport of his testimony. And also that was the definite testimony of H. B. Andrews. They said that they arrived at this by discussion and that Mr. Doolin then set the rates.

In any event, Your Honor, whatever the import of that argument might be, may I point out to Your Honor that in the very lease itself there is a

provision that "except as authorized in this lease document, no charges or fees of any kind shall be imposed by the lessor upon the lessee during the term of this lease."

That, Your Honor, is set forth in paragraph 13, page 13, and it states as follows:

"Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by the lessor, directly or indirectly, against the lessee or its employees, passengers, and so forth".

Now, Your Honor, I don't know what the purpose of that particular paragraph would be unless the parties intended that those particular charges and fees should remain for the duration [519] of the lease term. And here it is explicitly and specifically set forth in the lease document itself.

Going on briefly to another subject, Mr. Holm states that the general promulgation of these notices is sufficient notice to us. That is not the type of notice that was adverted to in the plaintiff's brief or in the argument this morning.

The cases hold if a rate is set forth in a contract, there must be notice given to that particular contract holder concerning the reasonableness or unreasonableness of that rate and if it desires a hearing had concerning the reasonableness or unreasonableness of that rate. I do not believe a general promulgation of a rate schedule was sufficient to meet that requirement of notice.

Mr. Holm briefly adverted to the fact that this



was a true utility because if somebody were hurt on the runway certainly the City, as well as the airline, would be sued. Well, I think we can agree with that, Your Honor. But the City would be sued only because it would be acting in its proprietary capacity or business capacity in the operation and management of the airport. Certainly we all know that if a governmental agency is acting in a governmental capacity it has its sovereign immunity and is protected from suit of that character.

There was some reference to the point of preference or [520] discriminatory rates. Well, of course that argument assumes that these lease charges are rentals or rates. And I think we went into the question that we do not believe that this is a charge applicable to or paid by the individual members of the public. It would doubtless seem that that argument has no validity with reference to this specific contract.

Mr. Holm then went through our brief and adverted to the various sections. He said that Section 1, which concerned the authorities we cited, statutory authorities, for the leasing of these facilities were more or less agreed to by the City and County. Of course we are gratified with that fact. And we are so, Your Honor, because I think it points out, Your Honor, that the other courts in the country that have even touched upon this problem have stated time and again that the lease of land and facilities is valid.

We have talked about the Milwaukee case which involved the lease of land and facilities at General

Mitchell Field in Milwaukee, and there the Supreme Court of Wisconsin talking about the contract stated that the lease of land and facilities between the National Carrier Airlines and the Municipal Airport Operator is valid.

Similarly, that was the statement and comment of the Oklahoma Court concerning the Will Rogers Memorial Airport.

Whenever courts have had occasion to touch upon this problem by dicta or otherwise, that has been the comment.

Now, there is also this to think about, Your Honor; I [521] have been advised definitely by people who know—airline people—that we operate at the Los Angeles International Airport, a huge airport, under contract and lease arrangement. Lockheed Air Terminal at Los Angeles is a privately operated air terminal. It has runways and ramps and taxiways. There isn't any question.

And I am also advised that that is the case in the fifty-one other points at which we operate throughout the United States. I believe that is practical authority for the proposition that the leasing of facilities and land at airports *at proper*.

Mr. Holm discussed Section 130 of the Charter. Now, of course that assumes that these rents and charges in our lease agreement are rates, and again we believe that if they are true rentals and charges for use of land and facilities, that that Section has no application.

Also, in line with the various Supreme Court cases we adverted to this morning, if the City has

both the power to fix rates unilaterally and fix rates by agreement—and by unilaterally, Your Honor, I mean fixing them in accordance with the Section 130—that if it *is elect* to fix the rates by way of contract its power to fix rates unilaterally or by a Public Utilities Commission is expended during the term of the lease. That is the precise holding of the St. Cloud case which was adverted to by Mr. Holm. That case states [522] specifically that if the City elects to fix its rates by contract, then its power to fix rates unilaterally during the term of the lease is suspended.

Now, Your Honor, we believe that essentially this case gets down to the determination of whether or not this airline, and other airlines at San Francisco and at points throughout the United States, is entitled to rely on these honest contracts, arrived at, as Mr. Holm stated, by honest people on a negotiated basis. We think the principle is the important thing in this case. And we believe that on the authorities stated here, as well as on the equities of the case, a decision should issue holding that this honest contract, openly arrived at, should be upheld.

Thank you, sir.

The Court: Now, gentlemen, I am going to inquire from you while you are here, and it might assist the Court in the final determination of this case, what questions are to be answered by this Court in this case as submitted? I take it you are submitting the case now on both sides?

Mr. Dyer: Yes, sir.

Mr. Holm: Yes, Your Honor.

The Court: What questions are for decision?

Mr. Holm: Well——

The Court: I will hear from counsel.

Mr. Dyer: Your Honor, we believe that the questions for [523] decision might almost be picked out from the main headings of our main brief. Perhaps not all of them need be answered extensively because Mr. Holm has admitted to some extent that, for instance, there is power to——

The Court: Pardon me, I have another suggestion.

Mr. Dyer: Yes, sir?

The Court: Since it needs some thought, I will give you five days on each side to submit that proposition.

Mr. Dyer: Thank you, sir.

The Court: So that you will have time to think the matter through.

Mr. Holm: Will counsel serve his suggestions on me within five days, and then I will reply and serve my suggestions on counsel five days after that.

The Court: Agreeable, counsel?

Mr. Dyer: I think so, Your Honor.

The Court: Five, five and five. He is the moving party. Do you want to go forward?

Mr. Dyer: Well, that is agreeable. My counter suggestion would be if we both put in concurrent suggestions within ten days.

The Court: Whatever way you wish.

Mr. Holm: I think the way first suggested would be better.

Mr. Dyer: We have a holiday.



Mr. Holm: Give him a week. [524]

The Court: The importance of that is, no matter what this Court may do, this case is worthy of going forward. I want to have a proper record. That is all I am trying to do.

Mr. Dyer: I agree, sir.

The Court: So that I may be able to assist the Court in making a final determination of this case. It's as simple as that to me.

Mr. Holm: If counsel submits his in a week I will be very glad to submit mine in a week.

The Court: I will give you ten, ten and ten, if you wish.

Mr. Holm: That will be better.

Mr. Dyer: That will be better.

The Court: All right, that will bring us to what date?

The Clerk: That will be January 29, Your Honor.

The Court: January 29. [525]

[Endorsed]: Filed April 12, 1954.

[Endorsed]: No. 14523. United States Court of Appeals for the Ninth Circuit. Trans World Airlines, Inc., a corporation, Appellant, vs. City and County of San Francisco, a municipal corporation, Phillip S. Landis, Sam McKee, Victor S. Swanson, Edward B. Baron and Donald A. Cameron, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. Dixon, as Manager and Chief Engineer of the San Francisco Airport, and J. M. Turner, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: September 20, 1954.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14523

TRANS WORLD AIRLINES, INC., formerly  
known as TRANSCONTINENTAL & WEST-  
ERN AIR, INC., a Delaware Corporation,  
Plaintiff and Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a  
California municipal corporation, et al.,  
Defendants and Appellees.

### APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Appellant, Trans World Airlines, Inc., a corporation, intends to rely on the following points on the appeal herein:

1. The District Court of the United States for the Northern District of California, Southern Division (hereinafter referred to as the "District Court"), erred in entering a judgment for appellee City and County of San Francisco, and in denying appellant's application for an injunction and other appropriate relief as prayed for in the complaint for each of the herein given reasons severally and for all of said reasons collectively.

2. The District Court erred in deciding that during the term of the lease between appellant and appellee City and County of San Francisco, said appellee regulated and prescribed rates applicable

to appellant which rates appellant was obliged to pay for the use of facilities at the San Francisco Airport.

3. The District Court erred in deciding that the furnishing of facilities consisting of ramps, runways, taxiways, beacons, signal lights, fire protective service and other facilities at the San Francisco Airport to appellant constitutes a public utility service.

4. The District Court erred in deciding that appellant and other airlines are the public served by the municipally owned airport.

5. The District Court erred in deciding that appellee City and County of San Francisco acted in a legislative or rate-fixing capacity when it fixed charges for the use of facilities by appellant and other airlines at the San Francisco Airport.

6. The District Court erred in deciding that appellee City and County of San Francisco through its Public Utilities Commission has jurisdiction and power to establish rates for the furnishing of a public utility service without the territorial limits of the City and County of San Francisco and that said appellee can exercise a police power or legislative rate-fixing power beyond its territorial limits and jurisdiction.

7. The District Court erred in deciding that appellee City and County of San Francisco under the doctrine of *Home Telephone Company vs. Los Angeles* (1908) 211 U.S. 265, and *Public Service Co. vs. St. Cloud* (1924) 265 U.S. 352, could not fix charges for the use of facilities at the San Fran-



cisco Airport by lease agreement with appellant binding on the parties for the lease term.

8. The District Court erred in deciding that as a matter of law a general schedule of rates and charges promulgated by appellee City and County of San Francisco supersedes all contracts between said appellee and appellant for the use of facilities at the San Francisco Airport.

9. The District Court erred in not deciding that statutes of the State of California and the Charter of the City and County of San Francisco authorize appellee City and County of San Francisco to lease facilities at the Airport for a definite term.

10. The District Court erred in not deciding that in the fixation of the charges for the use of facilities at the San Francisco Airport by appellant appellee City and County of San Francisco acted in a proprietary and not in a governmental capacity.

11. The District Court erred in failing to decide that the lease of land and facilities executed by appellee City and County of San Francisco and appellant is not a rate contract.

12. The District Court erred in failing to decide that there was no intention by appellee City and County of San Francisco to make the rates and charges contained in the general schedules of rates and charges applicable to the charges in the lease between appellant and appellee City and County of San Francisco during the term of said lease.

13. The District Court erred in failing to decide that appellee City and County of San Francisco intended at the time of the execution of the lease

by said appellee and appellant that the rates and charges provided in said lease would be effective and binding on the parties thereto for the lease term.

14. The District Court erred in failing to decide that appellee City and County of San Francisco at the time of the adoption of the schedules of rates and charges for the San Francisco Airport did not intend that the rates and charges contained in said schedules should supersede the rates and charges provided in the lease executed by said appellee and appellant on October 1, 1942.

15. The District Court erred in not deciding that appellee City and County of San Francisco has never validly regulated the charges for the use of Airport facilities set forth in the lease between appellant and said appellee.

16. The District Court erred in not deciding that appellant has never received notice from appellee City and County of San Francisco that the charges for the use of Airport facilities set forth in the lease between said appellant and said appellee were superseded, invalid or unreasonable.

17. The District Court erred in not deciding that appellee City and County of San Francisco has never held a hearing concerning the validity, reasonableness or supersedure of the charges for the use of Airport facilities contained in the lease between appellant and said appellee.

18. The District Court erred in not deciding that appellee City and County of San Francisco has never made a finding concerning the reasonableness or validity of the charges for the use of Airport

facilities contained in the lease between appellant and said appellee.

19. The District Court erred in not deciding that the general promulgation of a rate schedule by appellee City and County of San Francisco is not sufficient to supersede or invalidate specific rates and charges agreed to by said appellee and appellant for use of facilities at the San Francisco Airport.

20. The District Court erred in deciding that recovery for rates in accordance with a general rate schedule may be had for periods prior to the time that rates agreed to in a lease were brought before the Public Utilities Commission and regulation proposed.

21. The District Court erred in deciding that fire protective service is a common use facility involving the provision of a public utility service for which a public utility rate can be charged.

22. The District Court erred in deciding that appellant was obliged to pay appellee City and County of San Francisco \$9,600 for fire protective service for the period January 1, 1951, through December 31, 1954.

23. The District Court erred in deciding that there is due, owing and unpaid from appellant to appellee City and County of San Francisco for the period from January 1, 1951, to and including February 28, 1954, the sum of \$86,342.54 as and for flight departure charges.

24. The District Court erred for all reasons herein set forth, severally and collectively, in not

making and entering a judgment herein that the lease executed by appellant and appellee City and County of San Francisco is valid and binding on the parties thereto as to all its terms until the termination of said lease.

### Appellant's Designation of Record

Appellant hereby designates as material to the consideration of the appeal herein the following portions of the record:

1. Complaint (including exhibits).
2. Answer to complaint and cross complaint.
3. Answer of plaintiff and cross defendant to cross complaint.
4. Request for admissions by Trans World Airlines, Inc., dated March 19, 1952, and filed March 20, 1952.
5. Answer to request for admissions by City and County of San Francisco dated June 2, 1952, and filed June 4, 1952.
6. Motions to strike of Trans World Airlines, Inc., dated September 25, 1953, and filed September 25, 1953.
7. Oppositions to motion to strike by City and County of San Francisco dated October 30, 1953, and filed October 30, 1953.
8. Motions to strike by City and County of San Francisco dated October 30, 1953, and filed October 30, 1953.
9. Oppositions to motions to strike filed by Trans World Airlines, Inc., dated November 12, 1953, and filed November 12, 1953.



10. Proposed questions by Trans World Airlines, Inc., to be answered by decision dated January 8, 1954, and filed January 8, 1954.

11. Defendant City and County of San Francisco's statement of proposed questions to be answered by decision dated January 18, 1954, and filed January 18, 1954.

12. Plaintiff, Trans World Airlines, Inc.'s, proposed questions to be answered by decision in reply to defendants' statement of proposed questions, dated January 29, 1954, and filed January 29, 1954, and affidavit of service of said document dated January 29, 1954.

13. Reporter's transcript on the trial of the case and the transcript of the oral proceedings upon argument to the court on December 30, 1953.

14. Stipulation re Admission of Evidence dated May 20, 1954, and Exhibits A and B attached thereto.

15. The following exhibits of Trans World Airlines, Inc., entitled:

"No. 1—Number of Trans World's Airlines' Schedules per Month for Period of January 1, 1952, through December 31, 1952";

"No. 2—Recapitulation of Invoices Received from City and County of San Francisco Covering Fire Protective Service";

"No. 3—Recapitulation of Invoices Received from the City of San Francisco Covering Ramp Charges";

"No. 4—Statement of Rentals Paid by Trans World Airlines during 1952 under Lease dated

October 1, 1942, and Charges that Would Have Been Payable under the Schedules of Rates and Charges Effective January 1, 1951”;

“No. 5—Letter dated January 11, 1951, to Arthur Thompson from City and County of San Francisco Concerning Payment of Charges”;

16. The following exhibits of the City and County of San Francisco:

Lease executed October 1, 1942, by and between City and County of San Francisco, Lessor, and Transcontinental & Western Air, Inc., Lessee (Tr., p. 126, lines 3-8);

A—Trans World Airlines Actual Flight Departures from San Francisco Airport for the Period of January 1, 1951, to February 28, 1954;

B—San Francisco International Airport Rates and Charges Effective September 1, 1946;

C—San Francisco International Airport Rates and Charges Effective January 1, 1951;

D—Letter to A. R. Thompson of Trans World Airlines, Inc., dated January 11, 1951, and signed by Harold Messersmith and forms attached thereto;

G—Interim Rate and Charge Report, San Francisco Airport, March, 1951;

Q—Call for Bids for Lease and Signed Joseph J. Phillips, Director of Property;

R-1—PUC Resolution 4423, 6/2/41;

R-2—Affidavit of publication of Res. 4423;

R-3—PUC Resolution 4474, 6/23/41;

R-4—Journal of Proceedings, 6/30/41 of Board of Supervisors;

S-1—PUC Resolution 7504 and Affidavit of publication;

S-2—PUC Resolution 7829, 11/25/46;

S-3—Resolution 6106, series 1939 12/31/46;

S-4—PUC Resolution 7899, 1/6/47;

T-1—PUC Resolution 11093, 10/16/50;

T-2—Affidavit of M. M. Potter;

T-3—PUC Resolution 11182, 11/20/50;

T-4—Resolution 10628, series of 1939, 12/20/50.

17. Memorandum opinion and order of the District Court of the United States for the Northern District of California, Southern Division, dated March 5, 1954.

18. Proposed findings of fact and conclusions of law of plaintiff, Trans World Airlines, Inc., filed June 7, 1954.

19. Modifications of plaintiff, Trans World Airlines, Inc., to proposed judgment submitted by the City and County of San Francisco filed June 7, 1954.

20. Findings of fact and conclusions of law.

21. Judgment.

22. Notice of appeal.

23. Supersedeas bond.

24. Clerk's certificate.

25. The foregoing statement of points on which

appellant intends to rely on appeal and this designation by appellant of parts of the record material to the consideration of the appeal.

Dated: San Francisco, California, this 30th day of September, 1954.

/s/ LOYD WRIGHT,  
/s/ CHARLES A. LORING,  
/s/ LOYD WRIGHT, JR.,  
/s/ EUGENE M. PRINCE,  
/s/ NOEL DYER,

Attorneys for Plaintiff and  
Appellant

Of Counsel: Signed Wright, Wright, Green & Wright; Pillsbury, Madison & Sutro.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 1, 1954. Paul P. O'Brien,  
Clerk.

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[Title of U. S. Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS MAY BE  
CONSIDERED IN THEIR ORIGINAL  
FORM

It is hereby stipulated by and between the parties hereto through their respective counsel that the exhibits of said parties designated in paragraphs 15 and 16 of Appellant's Designation of Portions of Record Material to Appeal may be considered in their original form without the necessity of reproduction



in the record. Said exhibits consist of rate schedules, flight schedules, invoices and other documents which would be costly to print and which can be best observed in their original form.

Dated at San Francisco, California, November 4, 1954.

/s/ LOYD WRIGHT,  
/s/ CHARLES A. LORING,  
/s/ LOYD WRIGHT, JR.,  
/s/ EUGENE M. PRINCE,  
/s/ NOEL DYER,

Attorneys for Plaintiff and  
Appellant

Of counsel: Signed Wright, Wright, Green and  
Wright; Pillsbury, Madison & Sutro.

/s/ DION R. HOLM,  
City Attorney  
/s/ THOMAS M. O'CONNOR,  
Public Utilities Counsel,  
Attorneys for Defendants and  
Appellees

[Endorsed]: Filed Nov. 5, 1954. Paul P. O'Brien,  
Clerk.